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A TREATISE

ON THE LAW OF

FRAUD AND MISTAKE.

BY

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OF LINCOLN'S INN, BARRISTER-AT-LAW.

WITH NOTES TO AMERICAN CASES,

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PREFACE TO THE AMERICAN EDITION.

The English edition of this work, upon its first appearance, attracted the attention of the profession in this country on account of its fullness both in the text and in the citation of authorities, the general excellence of the plan, the mode of treating the subject, and the importance of the topics discussed. A work which thus presents the result of the latest decisions in England, ought to find its way into the majority of the libraries in this country, and an American edition became desirable.

In preparing such an edition, two plans were open. One was to make a collection of all the authorities in this country and add them as notes to the original text. A work which shall embrace all the English and American cases, is certainly desirable, but the chief objection to adding the American cases, as notes to an English text, is, that the notes would overwhelm the text, and such a result ought, in all cases, to be avoided. What is needed, is a skilful treatise which shall combine both the English and American law in one text; and the writer who has the patience and the diligence to examine all the American cases, will prepare such a work rather than make annotations to the text of some other author.

The present notes to the English text, therefore, make no such ambitious pretension as that of presenting the whole of the American law upon the subjects treated in the original text. Their aim is simply to make the English work more practically available to the American lawyer. Some topics have been treated more fully than others. On some points the practitioner has been left to rely upon the English text alone. This result has been the inevitable consequence of the fact that they do not pretend to be exhaustive. It is believed, however, that they will he found useful in practice and a desirable addition to the work.

ORLANDO F. BUMP.

BALTIMORE, Dec. 1st, 1871.

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FRAUD AND MISTAKE.

THE

PRINCIPLES AND PRACTICE OF EQUITY

IN CASES OF

FRAUD AND MISTAKE.

CHAPTER I.

FRAUD.

SECTION I.—GENERAL CONSIDERATIONS.

The first province of a court of equity being to enforce truth in the dealings of men, the prevention and correction of fraud is part of the original and proper office of the court.[1]

It is not easy to give a definition of what constitutes fraud in the extensive signification in which that term is understood by a court of equity.[2]* Courts of equity have always avoided hampering themselves by defining or laying down, as a gen-

[1] Warden *v.* Jones, 23 Beav. 493; Green *v.* Nixon. *ib.* 530; Ayre's Case, 25 Beav. 528.

[2] Green *v.* Nixon, 23 Beav. 530; Reynell *v.* Sprye, 1 D. M. & G. 691; *per* Lord Cranworth.

* By the term fraud, the legal intent and effect of the act complained of, is meant. An illegal act prejudicial to the rights of others, is a fraud upon such rights, although the parties may deny all intention of committing a fraud. Kirby *v.* Ingersoll, 1 Harring. Ch. 172.

The mere non-compliance with the terms of a contract, in not paying the stipulated consideration, is not a fraud. Farrar *v.* Bridges, 3 Humph. 566.

ral proposition, what shall be held to constitute fraud.[1] Fraud is so various in form and color that it is difficult, if not impossible, to confine it within the limits of any precise definition. The fertility of man's invention in devising new schemes of fraud is so great, that courts of equity have declined the hopeless attempt of embracing in one formula all its varieties of form and color, reserving to themselves the liberty to deal with it under whatever form it may present itself. As new devices of fraud are invented, they will be met by new correctives.[2] Fraud, in the contemplation of a court of equity, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another; or by which an undue or unconscientious advantage is taken of another.[3] * Fraud was defined by the Roman lawyers to be *omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita*.[4] All surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one is considered as fraud.[5] Fraud in all cases implies a willful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to, either at law or in equity.[6] By fraud, said Le Blanc, J.,[7] he understood an intention to deceive, whether from an expectation of ad-

[1] Lawley *v.* Hooper, 3 Atk. 279.
[2] Sawyer *v.* Vernon, 1 Vern. 387; Lawley *v.* Hooper, 3 Atk. 279; Webb *v.* Rorke, 2 Sch. & Lef. 666. Lord Hardwicke's Letter to Lord Kaimes, Life of Lord Kaimes, vol. II, p. 341; Anderson *v.* Fitzgerald, 4 H. L. 511, *per* Lord St. Leonards.
[3] 1 Fonb. Eq. Book 1, c. ii, § 3; Story's Eq. Jur. 187.
[4] Dig. Lib. 4, tit. 3, leg. 1.
[5] Finch, 439.
[6] Green *v.* Nixon, 23 Beav. 535.
[7] 2 East, 108.

* Belcher *v.* Belcher, 10 Yerg. 121; Kennedy *v.* Kennedy, 2 Ala. 571; Gale *v.* Gale, 19 Barb. 249.

vantage to the party himself, or from ill-will towards another. Collusion is considered in a court of equity as a fraud.[1]

The variety of forms which fraud may assume would seem to set all systematic classification at defiance, but Lord Hardwicke has done much towards simplifying that branch of the subject which relates to fraud in matters of contract by dividing it into four heads. First, actual fraud, or *dolus malus*, arising from facts and circumstances of imposition; secondly, fraud arising from the intrinsic nature and subject of the bargain; thirdly, fraud which may be presumed from the circumstances and condition of the parties contracting; fourthly, fraud which may be collected and inferred from the matter and circumstances of the transaction as being an imposition and cheat on other persons, not parties to the transaction.[2]

Courts of equity do not affect to consider fraud in the light of a crime; it is not their province to punish;[3] nor have they any censorial authority;[4] they interfere in cases of fraud in a civil and not in a criminal point of view.

Courts of equity have an original, independent, and inherent jurisdiction to relieve against every species of fraud,[5]* not being fraud of a penal nature. Every transfer or conveyance of property by what means soever it be done is in equity vitiated by fraud. Deeds, obligations, contracts, awards, judgments or decrees may be the instruments to which parties may resort to cover fraud, and through which they may obtain the most unrighteous advantages, but none of such devices or

[1] Garth *v.* Cotton, 3 Atk. 757; Bromley *v.* Smith, 26 Beav. 671; Spackman's Case, 34 L. J. Ch. 321.

[2] Chesterfield *v.* Jannsen, 2 Ves. 155, 156.

[3] See Waltham *v.* Broughton, 2 Atk. 43.

[4] See 2 V. & B. 298.

[5] Colt *v.* Woollaston, 2 P. Wms. 156; Steel *v.* Baylis, *ib.* 219; Franks *v.* Weaver, 10 Beav. 297; Glasse *v.* Marshall, 15 Sim. 71.

* Jones *v.* Bolles, 9 Wal. 364; Phalen *v.* Clark, 19 Ct. 421.

instruments will be permitted by a court of equity to obstruct the requisitions of justice. If a case of fraud be established, a court of equity will set aside all transactions founded upon it by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. It is immaterial whether such machinery and contrivance consisted of a decree in equity and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud.[1]* In all cases of fraud, not penal, a court of equity has a concurrent jurisdiction with courts of law,[2] with the single exception as to fraud in obtaining a will. With respect to fraud used in obtaining the execution or setting up a will, the jurisdiction does not exist. If the will be of real estate it is exclusively cognizable at law;[3] if of personal estate in the Court of Probate.[4] The courts of ordinary jurisdiction being competent to deal with the matter, there is no occasion for invoking the aid of a court of equity.[5]

Courts of equity and courts of law have in general a concurrent jurisdiction to suppress and relieve against fraud,† but there are many courses of conduct which a court of equity

[1] Bowen *v.* Evans, 2 H. L 281. See South Sea Co. *v.* Bumpstead, 3 Vin. Ab. 140; Richmond *v.* Tayleur, 1 P. Wms. 736; Filmer *v.* Gott, 4 Bro. P. C. 230; White *v.* Hall, 12 Ves. 324; Herbert *v.* Bulkeley, Ridg. 300; Brydges *v.* Branfill, 12 Sim. 369; Robinson *v.* Lord Vernon, 7 C. B. N. S. 231; Rogers *v.* Hadley, 32 L. J. Exch. 241.

[2] Colt *v.* Woollaston, 2 P. Wms. 156; Bright *v.* Eynon, 1 Burr. 396; Adamson *v.* Evitt, 2 R. & M. 71.

[3] Powis *v.* Andrews, 2 Bro. P. C. 534; Bates *v.* Graves, 2 Ves. J. 287; Jones *v.* Gregory, 2 D. J. & S. 87.

[4] Kerrick *v.* Bransby, 7 Bro. P. C. 437; Allen *v.* Macpherson, 1 H. L. 191; Jones *v.* Gregory, 2 D. J. & S. 87.

[5] *Ib.*

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* Perigue *v.* Wood, 1 Johns. Ch. 401; Niles *v.* Anderson, 5 How, (Miss.) 365; Hoitt *v.* Holcomb, 23 N. H. 535.

† Smith *v.* McIver, 9 Wheat. 532; White *v.* Jones, 4 Call, 253; Allen *v.* Hopson, 1 Freem. 276; Haden *v.* Garden, 7 Leigh, 157; Poore *v.* Price, 5 Leigh, 52; Crane *v.* Conklin, Saxton, 346; Boreing *v.* Singery, 4 H. & McH. 398.

construes to be fraudulent, which cannot be taken notice of by a court of law,[1] though it is not easy to define the distinction between that which a court of equity treats as a fraud and that which is considered fraud at law.[2] "There is a very great distinction," said Kindersley, V.-C., in Stewart *v.* Great Western Railway Company,[3] "between fraud as regarded by a court of equity and fraud as regarded by a court of law. To draw the line between them, and to give such a definition of the one and of the other as should meet all possible cases would be a very difficult, if not impossible, task. In order to constitute fraud at common law, it is not enough to show that fraud in the sense of misrepresentation and undue advantage of the position of the parties said to be imposed on has been commit ted, but the extent of the fraud must be brought home to the party to the action who is charged with it. In the case of fraud in the sense of a court of equity, a court of equity will take into account all the circumstances of the case—not only the act and intention of the party, but the circumstances under which the act was done; the position of the party who is said to be imposed upon; his being *inops consilii;* his being in a state of bodily, and, therefore, mental weakness, and so on. *Non constat* these are sufficient to constitute legal fraud."

If there is a full, perfect, and complete remedy at law, it is not the course of the court to interfere.[4]* But the circum-

[1] Trenchard *v.* Wanley, 2 P. Wms. 166; Butcher *v.* Butcher, 1 V. & B. 98; Clarke *v.* Manning, 7 Beav. 167.
[2] Traill *v.* Baring, 33 L. J. Ch. 521.
[3] 2 Dr. & Sm. 438. 11 Jur. N. S. 627.
[4] Newham *v.* May, 13 Pri. 752; Decre *v.* Guest, 1 M. & C. 516.

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* Russell *v.* Clark's Executors, 7 Cranch, 69.

Before a creditor can obtain the aid of a court of chancery to set aside a fraudulent conveyance, he must obtain judgment, issue an execution and procure a return of *nulla bona.* Hendricks *v.* Robinson, 2 Johns. Ch. 283; Brinkerhof *v.* Brown, 4 Johns. Ch. 671; s. c. 6 Johns. Ch. 139; Halbert *v.* Grant 4 Mon. 581; Poague *v.* Boyce, 6 J. J. Marsh. 70; Chamber-

stance that relief may be had at law does not exclude the jurisdiction of the court.[1] The rule of the court is to interfere in all cases where the interests of justice call for and require its interference.[2]* Although a man may have a good defence to an action at law, he is not precluded from proceeding in equity to restrain the action. It is enough if he can show an equitable case.[3] If there be an equitable case stated by the bill, there is jurisdiction to interfere by way of injunction, if neces-

[1] Evans *v.* Bicknell, 6 Ves. 183; Adamson *v.* Evitt, 2 R. & M. 70; Wilson *v.* Short, 6 Ha. 366, 374; Rolfe *v.* Earl of Devon, 4 Jur. N. S. 247; *per* Lord Cranworth; Slim *v.* Croucher, 1 D. F. & J. 523.

[2] Johnson *v.* Ogilvy, 2 Eq. Ca. Ab. 31; Chesterfield *v.* Janssen, 2 Ves. 155; Bartlett *v.* Salmon, 6 D. M. & G. 40; Slim *v.* Croucher, 1 D. F. & J. 523; Barry *v.* Crosskey, 2 J. & H. 1.

[3] Fernbrough *v.* Leader, 15 L. J. Ch. 458; London Assurance Co. *v.* Moses, 11 L. T. 552.

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layne *v.* Temple, 2 Rand. 384; Griffin *v.* Nitcher, 57 Me. 270; Jones *v.* Green, 1 Wall. 330.

After judgment by default against the debtor who has made a fraudulent conveyance, an attaching creditor may proceed in chancery. Dodge *v.* Griswold, 8 N. H. 425.

A judgment need not be obtained when the fraudulent grantor is deceased. O'Brien *v.* Coulter, 2 Blackf. 421; Birely *v.* Staley, 5 G. & J. 432.

Where the claim is purely equitable, and such as a court of equity will take cognizance of in the first instance, it will go on and remove all obstructions to its enforcement. Halbert *v.* Grant, 4 Mon. 589.

If a claim is to be satisfied out of a fund which is accessible only by the aid of a court of equity, application may be made in the first instance to that court. O'Brien *v.* Coulter, 2 Blackf. 421.

If parties concerned in a partnership have dissolved, and made a disposition of the property which is fraudulent, as to partnership creditors, a court of equity will entertain a bill filed by the latter, although they are simple contract creditors. Lawton *v.* Levy, 2 Edw. Ch. 195.

It is not enough that there is a remedy at law; it must be plain and adequate—in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Boyce *v.* Grundy, 3 Pet. 377.

* Wamburzee *v.* Kennedy, 4 Dessau. 474.

A court of equity will annul an instrument obtained by fraud, although there may be a good defence at law. Johnson *v.* Hendley, 5 Munf. 219; Henshaw *v.* Atkins, 2 Root. 7.

If the grantor is insolvent, a bond of conveyance which has been ob-

sary, and also by way of ordering the instrument to be delivered up.[1] The question for the court to consider always is, whether the facts are such as to constitute that kind of fraud, which a court of law would necessarily take cognizance of and treat as a fraud in the same manner and to the same extent as a court of equity would do.[2] The superior powers and efficiency of a court of equity in molding its decrees so as to meet the exigencies of each particular case and do justice between the parties in the most minute detail, is often of itself a sufficient ground for the exercise of the jurisdiction in cases where there is a clear remedy at law.[3] In Colt *v.* Woollaston[4] it was held that a person who had been indueed by fraud on the part of the promoters of a public company to subscribe for shares might obtain his money back by a bill in equity, although an action at law might have been brought for the same purpose with success. This doctrine has ever since been recognized as correct, and it has been frequently acted on.[5] If a case of fraud be presented to the court, an equity is at once raised to restore the parties deceived, as nearly as possible, to the situation in which but for the fraud they would have stood,

[1] Traill *v.* Baring, 33 L. J. Ch. 527, *per* Turner, L J. See Lloyd *v.* Clarke, 6 Beav. 309; Llewellin *v.* Pace, 1 W. R. 28; Smith *v.* Reese River Co., L. R. 2 Eq. 264.

[2] Ayre's Case, 25 Beav. 528; Stewart *v.* Great Western Railway Co., 2 Dr. & Sm. 438.

[3] Dright *v.* Eynon, 1 Burr. 396; Ayre's Case, 25 Beav. 528; Slim *v.* Croucher, 1 D. F. & J. 523; Stewart *v.* Great Western Railway Co., 2 Dr. & Sm. 438 11 Jur. N. S. 627.

[4] 2 P. Wms. 154.

[5] Green *v.* Barrett, 1 Sim. 45; Blain *v.* Agar, 2 Sim. 289; Stainbank *v.* Fernley, 9 Sim. 556; Cridland *v.* De Mauley, 1 Deg. & Sm. 459; Beeching *v.* Lloyd, 3 Drew. 227; Barry *v.* Crosskey, 2 J. & H. 1; Henderson *v.* Lacon, L. R. 5 Eq. 250. But see Thompson *v.* Barclay, 9 L. J. Ch. 219, *per* Lord Brougham.

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tained by fraud will be rescinded for defect of title, although there may be a good defence at law. Ingram *v.* Morgan *et al.*, 4 Humph. 66.

There is no distinction between cases of relief when damages are occasioned by fraud and when they are occasioned by breach of contract. If there is an adequate remedy at law, a court of equity has no jurisdiction. Woodman *v.* Freeman, 25 Me. 531.

and for which damages in an action might be a very inadequate remedy. It is no objection to this equity that the facts may also support an action.[1] If the amount of damage is ascertained, or capable of being easily ascertained, the court will not send the matter to a jury.[2]

In the view of a court of equity, a man who has been induced by fraud to convey an estate remains the owner, subject to the repayment of the moneys which he has received.[3]

A contract or other transaction induced or tainted by fraud is not void, but only voidable at the election of the party defrauded.[4]* The party defrauded has a right to have it avoided, unless he has by his own act put it out of his power to reinstate the party against whom he seeks relief in the position in which he stood at the time of the transaction,[5] or unless some innocent party would be prejudiced thereby.[6] The transaction being valid until it is avoided, third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded.[7] Persons, for instance, who have been induced by the

[1] Blair *v.* Bromley, 2 Ph. 361, *per* Lord Cottenham; Walsham *v.* Stainton, 1 D. J. & S. 678; St. Aubyn *v.* Smart, L. R. 5 Eq. 183. See Barry *v.* Crosskey, 2 J. & H. 1, *infra*.

[2] Ingram *v.* Thorp, 7 Ha. 76. See Henderson *v.* Lacon, L. R. 5 Eq. 250; comp. Whitmore *v.* Mackeson, 16 Beav. 128.

[3] Stump *v.* Gaby, 2 D. M. & G. 630.

[4] Clarke *v.* Dickson, El. Bl. & El. 148; Rawlins *v.* Wickham, 3 D. & J. 322. Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. Ca. 156; Oakes *v.* Turquand, L. R. 2 App. Ca. 346.

[5] White *v.* Garden, 10 C. B. 919; Deposit and General Life Assurance Co. *v.* Ayscough, 6 E. & B. 761; Clarke *v.* Dickson, El. Bl. & El. 148; Nicoll's Case, 3 D. & J. 387; Mixer's Case, 4 D. & J. 586.

[6] Scholfield *v.* Templer, 4 D. & J. 429.

[7] Oakes *v.* Turquand, L. R. 2 App. Ca. 375. See Kingsford *v.* Merry, 11 Exch. 579.

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* Bank of Georgia *v.* Higginbottam, 9 Pet. 48; Lockbridge *v.* Foster *et al.*, 4 Scam. 569.

That is absolutely void which the law or the nature of things forbids to be enforced at all, and that is relatively void which the law condemns as a wrong to individuals, and refuses to enforce as to them. Acts tainted with infirmity may well be called by some void and by others voidable, because, regarded in different aspects, they are both. A contract may for

fraud of the directors of a company to become shareholders of the company, cannot, as against creditors of the company, repudiate their liability as shareholders after discovering the fraud.[1]

The case of goods, or personal property, obtained by felony, or by a trick, must be distinguished from the case of goods obtained by fraud. In the one case, the owner has no mind or intent to part with his property in the goods. In the other case, he acts with the intention of parting with the property, though the intention has been induced by undue means.[2] Goods obtained by felony, or by a trick, may be reclaimed by the true owner even from a *bonâ fide* purchaser,[3] unless they have been purchased in market overt.

A distinction must also be taken between cases where a man executes an instrument with the mind and intention to

[1] Oakes *v.* Turquand, L. R. 2 App. Ca. 325.

[2] 10 C. B. 924, 927, *per* Williams and Talfourd, JJ.; Hardman *v.* Booth, 1 H. & C. 803.

[3] Hardman *v.* Booth, 1 H. & C. 803.

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a time be voidable as against one, and void as against the others whom it is intended to affect: voidable as against the parties doing wrong and void as against the persons wronged; or, *vice versa*, voidable in favor of the persons wronged, and void in favor of the wrong-doer; void as not binding to fulfill, and voidable after fulfillment; voidable in fact because void or not binding in right. Persons intended to be wronged by a transaction are not bound by it, nor are they bound to reject it. They may adopt, or confirm, or agree to be bound by it. Their consent, which, because of the wrong, the law considers as not given, may be given after the wrong becomes known, and then, if given with the freedom, intelligence and deliberation that the law of ratification requires, and in a form adequate to the particular kind of contract, they become willing parties to the contract, bound equally with others. Pearsoll *v.* Chapin, 44 Penn. 9.

A party who affirms a voidable contract, is bound by it in all its particulars. Galloway *v.* Holmes, 1 Doug. 330.

Fraud in a conveyance can only be set up by the parties to a deed and those who have succeeded to their rights, and not by third parties. Love *v.* Belk, 1 Ired. Ch. 163.

The assignee of a contract cannot take advantage of any fraud practiced upon his grantor in making it. Carroll *v.* Potter, Walk. Ch. 355.

execute it, though his assent may have been obtained by fraud, and cases where a man is by fraudulent contrivance induced to put his hand and seal to an instrument which he never intended and had no mind to execute. If a man having no mind or intention to execute a particular instrument does what he does with the mind and intention to execute a deed of a different kind, and for a different purpose from that which by fraud and deceit was substituted, the deed is not voidable but void, and no estate passes, at least as between the parties to the instrument and parties taking with notice.[1]* Thus, where a man intending to execute a covenant to produce title deeds, put his hand and seal to a deed which was falsely and fraudulently read over to him, and represented as being a covenant to produce, when in fact it was a mortgage, the deed was held void as being a cheat and trick.[2] So also, where a broker fraudulently obtained from his employer the cancellation of his signature to a transfer of shares which he had bought for him, and by means of the cancelled transfer and certificates induced the vendor to execute a fresh transfer to himself, and thereupon got the shares registered in his own name, and then mortgaged them to the defendant, it was held that the effect of the first transfer was not destroyed by the cancellation fraudulently ob-

[1] Vorley *v.* Cooke, 1 Giff. 234; Ogilvie *v.* Jeaffreson, 2 Giff. 353. See further, *infra*.

[2] Vorley *v.* Cooke, 1 Giff. 234; Lee *v.* Angas, 15 W. R. 119.

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* A person who has obtained an absolute deed under a promise to execute a defeasance, may be compelled to perform his promise. Peck *v.* Baldwin, 1 Root, 455.

The payee of a note who has been induced by fraud to destroy it, may have relief in equity. Richards *v.* Fridley Wright, 167.

A mortgage which has been released through fraud may be reinstated. Poore *v.* Price, 5 Leigh, 52; Trenton Banking Co. *v.* Woodruff, 1 Green. Ch. 117; Barnes *v.* Carmack, 1 Barb. 392; Lynch *v.* Tibbits, 24 Barb. 51.

A fraudulent release, obtained from one partner, does not extinguish the lien of the other partners. Canal Co. *v.* Gordon, 6 Wall. 561.

tained, and the registration was set aside.[1] So also, in a case where the persons named as grantor and grantee in a deed had no mind or intention that any estate should pass from the one to the other, and were merely cheated into the execution of deeds without a knowledge of their contents, no estate was held to pass.[2]

Similar considerations apply to the case of forged instruments. No estate can pass under a forged instrument,[3] but in special cases an innocent party whose title to property is derived under a forged instrument may, as against the party on whom the forgery has been practiced, have a better equity to the retention of the property.[4]

If a transaction has been originally founded on fraud, the original vice will continue to taint it, however long the negotiation may continue, or into whatever ramifications it may extend.[5] Not only is the person who has committed the fraud precluded from deriving any benefit under it, but an innocent person is so likewise, unless there has been some consideration moving from himself.[6]

In equity, no length of time will run to protect or screen fraud.[7] "Those," said Lord Cottenham in Trevelyan *v.* Charter,[8] "who may be disposed fraudulently to appropriate to themselves the property of others, may be assured that no time will secure them in the enjoyment of their plunder; but that their children's children will be compelled by this court to

[1] Donaldson *v.* Gillott, L. R. 3 Eq. 277.

[2] Ogilvie *v.* Jeaffreson, 2 Giff. 353.

[3] Esdaile *v.* La Nauze, 1 Y. & C. 391; Boursot *v.* Savage, L. R. 2 Eq. 134.

[4] Jones *v.* Powles, 3 M. & K. 581. See further, *infra*.

[5] Bridgman *v.* Green, 2 Ves. 626; Reynell *v.* Spryc, 1 D. M. & G. 660, 697; Bowen *v.* Evans, 2 H. L. 281; Smith *v.* Kay, 7 H. L. 750, 775.

[6] Bridgman *v.* Green, 2 Ves. 626; Huguenin *v.* Basley, 14 Ves. 289; *per* Lord Eldon; Goddard *v.* Carlisle, 9 Pri. 169; Daubeney *v.* Cockburn, 1 Mer. 643; Bowen *v.* Evans, 2 H. L. 259; Russell *v.* Jackson, 10 Ha. 212; Scholfield *v.* Templer, Johns. 165; 4 D. & J. 429; Topham *v.* Duke of Portland, 1 D. J. & S. 569, *per* Turner, L. J.

[7] Cotterell *v.* Purchase, Forrest, 61; Irvine *v.* Kirkpatrick, 7 Bell's Sc. App. Ca. 186; Allfrey *v.* Allfrey, 1 Mac. & G. 99; Bowen *v.* Evans, 2 H. L. 257; Walsham *v.* Stainton, 1 D. J. & S. 678.

[8] 4 L. J. Ch. N. S. 214.

restore it to those from whom it has been fraudulently abstracted."[1] The right of the party defrauded to have the transaction set aside, is not affected by lapse of time, so long as he remains without any fault of his own in ignorance of the fraud which has been committed.[2] The equity is not confined to the party defrauded, but extends to heirs at law in respect of frauds committed on their ancestor.[3]

A man cannot repudiate a transaction as far as it is onerous to himself, and adopt it as far as it is beneficial. He must be able to deal with the whole either by adopting or rejecting it *in toto*.[4] * There may, however, be cases in which the same transaction may be good as to part and for certain purposes, although voidable as to other parts and for other purposes.[5] If a transaction is fair as between the parties to it, it is not invalid merely because it may have been concocted and brought about by a third party with a fraudulent intention of benefiting himself. In such a case, so far as regards the third party, the whole may be looked upon as one transaction

[1] See Alden *v.* Gregory, 2 Ed. 280; Whalley *v.* Whalley, 1 Mer. 436; Chennell *v.* Martin, 9 L. J. Ch. 208.

[2] Blair *v.* Bromley, 2 Ph. 361; Rolfe *v.* Gregory, 34 L. J. Ch. 275.

[3] Falkner *v.* O'Brien, 2 Ba. & Be. 221.

[4] Bennett *v.* Wade, 1 Dick. 84; Bellamy *v.* Sabine, 2 Ph. 450; Hanson *v.* Keating, 4 Ha. 1; Great Luxemburg Railway Co. *v.* Magnay, 25 Beav. 594.

[5] Bellamy *v.* Sabine, 2 Ph. 425, 437.

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* Farmers' Bank of Va. *v.* Groves, 12 How. 51; Kinney *v.* Kiernan, 2 Lans. 492; Voorhies *v.* Earl, 2 Hill, 288; Jankins *v.* Simpson, 2 Shep. 364; Fay *v.* Oliver, 20 Vt. 118; Jennings *v.* Gaze, 13 Ill. 610; Masson *v.* Bovet, 1 Denio, 74; Clarkson *v.* Mitchell, 3 E. D. Smith. 269; Jewett *v.* Petit, 4 Mich. 508; Kimball *v.* Cunningham, 4 Mass. 504; Stevens *v.* Hyde, 32 Barb. 171; McGuire *v.* Callahan, 19 Ind. 128.

The proper application of the rule in case of a sale is to the property sold when that consists of several particulars: The contract cannot be rescinded, as to a part of the property, and left in force as to the rest. But if the vendor has been induced through imposition effected by the vendee to accept that in payment which proves to be no such payment as he had the right to expect, he is permitted to renounce it, and prosecute his claim for the property sold as if no such payment had been attempted. Loomis *v.* Wainwright, 21 Vt. 520; Martin *v.* Roberts, 5 Cush. 126.

in order to judge of his motives, and to put a construction upon his acts; but, as regards the other two, who, though affected by one part of the transaction, may be total strangers to the other part, it is not only not necessary, but it would be unjust to consider every part of the transaction affected by objections, which, in fact, apply only to particular portions of it.[1] If, for instance, a man brings about an arrangement between father and son, in order that he might afterwards deal with the son, the motive might be most improper, but the arrangement between father and son must be judged of upon its own merits.[2] Nor is an instrument which has been entered into between parties for a purpose which may be considered fraudulent as against a third party necessarily invalid as between themselves.[3]

SECTION II.—MISREPRESENTATION—CONCEALMENT.

The largest class of cases in which courts of justice are called upon to give relief against fraud, is where there has been a misrepresentation, or *suggestio falsi*.[4] If a man represents, as true, that which he knows to be false, and makes the representation in such a way, or under such circumstances as to induce a reasonable man to believe that it is true, and is meant to be acted on, and the person to whom the representation has been made, believing it to be true, acts upon the faith of it, and by so acting sustains damage, there is fraud to support an action of deceit at law, and to be a ground for the rescission of the transaction in equity.[5] * It is not, however,

[1] Ib. 438.
[2] Ib.
[3] Shaw *v.* Jeffery, 13 Moo. P. C. 432.
[4] Broderick *v.* Broderick, 1 P. Wms. 240; Jarvis *v.* Duke, 1 Vern. 20.
[5] Evans *v.* Bicknell, 6 Ves. 174;

* Where a party misrepresents a material fact by which another is misled or imposed upon, to obtain an undue advantage of him, it is

necessary, in order to constitute fraud, that a man who makes a false representation should know it to be false. It is enough that it be false, if it be made recklessly without an honest belief in its truth, or without reasonable grounds for believing it to be true, and be made deliberately and in such a way as to give the person to whom it is made reasonable ground for supposing that it was meant to be acted on, and has been acted on by him accordingly.[1] If a man makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, he is guilty of fraud, as much as if he knew it to be untrue. It is in law a willful falsehood for a man to assert as of his own knowledge a matter of which he has no knowledge.[2] It is a wrong to state as true what the person making such statement does not know to be true, even though he does not know it to be false, but believes without

Edwards *v.* M'Cleay, 2 Sw. 287; Adamson *v.* Evitt, 2 R. & M. 71; Attwood *v.* Small, 6 Cl. & Fin. 233; Gerhard *v.* Bates, 2 E. & B. 475; Jennings *v.* Broughton, 6 D. M. & G. 126; Rawlins *v.* Wickham, 3 D. & J. 304; Slim *v.* Croucher, 1 D. F. & J. 518.

[1] Pickard *v.* Sears, 6 A. & E. 469; Taylor *v.* Ashworth, 11 M. & W. 413; West *v.* Jones, 1 Sim. N. S. 297; Evans *v.* Edmonds, 13 C. B. 786; Thom *v.* Bigland, 8 Exch. 725; Hutton *v.* Rossiter, 7 D. M. & G. 23; Rawlins *v.* Wickham, 3 D. & J. 304; Swan *v.* North British Australian Co., 2 H. & C. 182. See Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. Ca. 162.

[2] Hazard *v.* Irwin, 18 Pick. (Amer.) 96; Stone *v.* Denny, 4 Metc. (Amer.) 151.

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fraud. Donelson *v.* Clements, Meigs, 155. The representation must have been deliberately made. Representations of a fugitive sort uttered casually in a mixed conversation from impulse rather than reflection should be cautiously received when they are to be made the basis of liability. It is the deliberate will and intention of the person uttering the words, and fairly to be inferred therefrom, and not their naked import that ought to make him liable. The person making the representations should be apprised by the person to whom they are made of the purpose for which they are required. They must be made deliberately, with the consciousness, on the part of the person making them, that they will be confided in by the person to whom they are made Casey *v.* Allen, 1 A. K. Marsh. 465.

sufficient grounds that the statement will ultimately turn out to be correct.[1] *

An intention to deceive being a necessary element or ingredient of fraud, a false representation does not amount to a fraud at law, unless it be made with a fraudulent intent. There is a fraudulent intent if a man, either with the view of benefiting himself, or misleading another into a course of action which may be injurious to him, makes a representation which he knows to be false, or which he does not believe to be true.[2] The legal definition of fraud does not, however, include necessarily any degree of moral turpitude.[3] There is fraud in law, if a man makes a representation which he knows to be false, or does not honestly believe to be true, with the view to induce another to act on the faith, who does so accordingly, and by so doing sustains damage, although he may have had no dishonest purpose in making the representation. If a man knowingly and willfully makes a false representation, whereby another is misled to his prejudice, it is immaterial that there may have been no intention on his part to benefit himself, or to injure the person to whom the representation was made. If a man says what is false within his knowledge, or what he has no reasonable ground for believing to be true, and makes

[1] 1 Smout *v.* Ilbery, 10 M. & W. 10.
[2] Taylor *v.* Ashworth, 11 M. & W. 413; Evans *v.* Edmonds, 13 C. B. 786; Thom *v.* Bigland, 8 Exch. 725.
[3] 6 M. & W. 377; 10 M. & W. 155, *per* Lord Abinger.

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* Bennett *v.* Judson, 21 N. Y. 238; Harding *v.* Randall, 15 Me. 332; Stone *v.* Denny, 4 Met. 151; Buford *v.* Caldwell, 3 Mo. 477.

When a party to a contract places a known trust and confidence in the other party, and acts upon his opinion, any misrepresentation by the party so trusted in a material matter, constituting an inducement or motive to the act of the other party, and by which an undue advantage is taken of him, is regarded as a fraud. Laidlaw *v.* Organ, 2 Wheat. 178; Jouzin *v.* Toulmin, 9 Ala. 662; Shaeffer *v.* Sleade, 7 Blackf. 178; Hunt *v.* Moore, 2 Barr. 105.

the representation with the view to induce another to act upon it, who does so accordingly to his prejudice, the law imputes to him a fraudulent intent, although he may not have been in fact instigated by a morally bad motive. An intention to deceive or a fraudulent intent in the legal acceptation of the term, depends upon the knowledge or belief respecting the falsehood of the statement, and not upon the actual dishonesty of purpose in making the statement.[1] * Where, for instance, the defendant had accepted a bill of exchange in the name of the drawee, purporting to do so by procuration, knowing that in fact he had no such authority, but fully believing that the acceptance would be sanctioned and the bill paid by the drawee, and the drawee repudiated the acceptance, it was held, though the jury negatived a fraudulent intention in fact, that the defendant had committed a fraud in law by making a representation which he knew to be untrue, and which he intended others to act upon.[2]

The presence or absence of a corrupt motive or dishonest purpose distinguishes moral from legal fraud. A misrepresentation made without a corrupt motive or dishonest purpose is called legal fraud. If there be present a corrupt motive or dishonest purpose in making a misrepresentation, there is moral fraud.[3]

In Wilde *v.* Gibson,[4] a fraudulent intention was not imputed to a man by reason merely of his having constructive notice that a representation made by him was untrue, when he

[1] Foster *v.* Charles, 7 Bing. 107; Polhill *v.* Walter, 3 B. & Ad. 114; Murray *v.* Mann, 2 Exch. 541, *per* Lord Wensleydale; Wilde *v.* Gibson, 1 H. L. 633, *per* Lord Campbell.

[2] Polhill *v.* Walter, 3 B. & Ad. 114.

[3] Moens *v.* Heyworth, 10 M. & W. 517, *per* Lord Wensleydale; Wilde *v.* Gibson, 1 H. L. 633, *per* Lord Campbell.

[4] 1 H. L. 605.

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* Page *v.* Bent, 2 Met. 371; Collins *v.* Dennison, 12 Met. 549; Elliott *v.* Boaz, 9 Ala. 772.

had no actual knowledge that it was untrue. But the judgment in this case has been expressly disapproved of by Lord St. Leonards,[1] * and cannot, though it was the decision of the highest tribunal, be considered as founded on sound principles.

If a man makes a representation in the honest belief that it is true, and there be reasonable ground for such belief, a fraudulent intent will not be imputed to him, although it may turn out to be false,[2] unless there be a duty cast on him to know the truth.[3] A misrepresentation made through honest mistake is not a ground for rescinding a transaction at law,[4] unless the subject-matter be different in substance from what it was represented to be. In cases where a contract is sought to be rescinded on the ground of fraud, it is enough to show a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it be such as to show that there is a complete difference between what was represented and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought they

[1] Sug. L. Prop. 660.
[2] Haycraft *v.* Creasy, 2 East, 92; Collins *v.* Evans, 5 Q. B. 820; Thom *v.* Bigland, 8 Exch. 726.
[3] Thom *v.* Bigland, *ib.*, *infra*.
[4] Ormrod *v.* Huth, 14 M. & W. 651.

* A person who represents an article to be good as far as he knows, and yet conceals facts that would tend materially to diminish its value in the estimation of the purchaser, is guilty of affirmative misrepresentation Wheelock *v.* Wheeler, 34 Vt. 533.

were dealing about a sound horse, and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole of the price, unless there was a condition to that effect in the contract. The principle is well illustrated by the civil law as stated in the Digest.[1] There, after laying down the general rule that where the parties are not at one as to the subject of the contract there is no agreement, and that this applies where the parties have misapprehended each other as to the *corpus*, as where an absent slave was sold, and the buyer thought he was buying Pamphilus, and the vendor thought he was selling Stichus; and pronouncing the judgment that in such a case there was no bargain because there was *error in corpore*, the framers of the Digest meet the point thus: "*Inde quæritur si in ipso corpore non erretur sed in substantia error sit ut puta si acetum pro vino veneat, aes pro auro, vel quid aliud argento simile; an emptio et venditio sit;*" and the answers given by the great jurists quoted are to the effect that if there be a misapprehension as to the substance of the thing, there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. Paulus says, "*si aes pro auro veneat, non valet, aliter atque si aurum quidem fuerit, deterius autem quam emptor estimaret; tunc enim emptio valet.*"[2]

The principle of our law is the same as that of the civil law. If the thing sold differs in substance from what the purchaser was led by the vendor to believe he was buying, there is no contract. In Gompertz *v.* Bartlett,[3] and Gurney *v.* Womersley,[4] a man who honestly sold what he thought was a

[1] Lib. 18, *De contrahenda emptione*, Tit. 1, leg. 9, 10, 11.

[2] Kennedy *v.* Panama, &c. Co., L. R. 2 Q. B. 587.

[3] 2 E. & B. 849.

[4] 4 E. & B. 133.

bill without recourse to him, was held nevertheless bound to return the price, on its turning out that the supposed bill was void under the stamp laws in the one case, and was a forgery in the other.[1] So also where cotton was sold by sample, and the sample was long stapled cotton, but the cotton delivered was short stapled cotton, the cotton was held to be different in kind from what the purchaser had contracted to buy, and that he was entitled to reject it.[2] If, on the other hand, the purchaser receives what answers the description of the article sold, and there is no difference in substance between the article delivered and the article sold, but only a difference in some quality or accident, the contract remains binding in the absence of a warranty, even though a misapprehension caused by the incorrect representation of the vendor may have been the actuating motive to the purchaser.[3] In such a case the rule *caveat emptor* will apply.[4] In a case, accordingly, where a steam-packet company issued a prospectus stating in effect that they had entered into a contract with a colonial government for the carrying of mails between certain places, and a man induced by the terms of the prospectus applied for and obtained some of the shares, but the contract, not being binding on the colonial government, was repudiated, it was held that the representation did not affect the substance of the matter, the applicant having actually got shares in the very company, for shares in which he had applied, and the shares being a property of considerable value in the market, though perhaps not so valuable as they would have been had the statement in the prospectus been strictly accurate.[5] The difficulty in every case is to determine whether the mistake or misapprehension

[1] See Flight *v.* Booth, 1 Bing. N. C. 377.

[2] Azemar *v.* Casella, L. R. 2 C. P. 677.

[3] Kennedy *v.* Panama, &c. Co., L. R. 2 Q. B. 587.

[4] *Ib.* 2 E. & B. 850, *per* Lord Campbell.

[5] Kennedy *v.* Panama, &c. Co., L. R. 2 Q. B. 580.

is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only as to some point, even though a material point, an error as to which does not affect the substance of the whole consideration. There may be misapprehension as to that which is a material part of the motive inducing the transaction, but not so as to prevent the subject-matter of the transaction from being in substance what it was represented to be.[1]

The same principles apply in equity. A man who makes a representation which he honestly and upon reasonable grounds believes to be true, or believes himself entitled to assert, is not, independently of a duty cast on him to know the truth, bound in equity, if the representation turns out to be untrue, to make good what he has so represented.[2] "There is no case in equity," said Lord Thurlow, in Merewether *v.* Shaw,[3] "where a man making an honest representation when called upon to give an account of the circumstances of another, has been held liable in this respect to make good what he has so represented." From certain dicta to be found in the reports, it may appear doubtful whether the same principles apply in equity where a claim is made for the restitution of property acquired through incorrect representations made by honest mistake. In Rawlins *v.* Wickham,[4] Turner, L. J., said that if, upon a treaty for purchase, one of the parties to the contract makes a representation materially affecting the subject-matter of the contract, he cannot be allowed to retain any benefit which he has derived, if the representation proves to be untrue, and that no man can be held to what he has done under circumstances which have been erroneously represented to him by the other party to the transaction, however inno-

[1] Kennedy *v.* Panama, &c. Co., L. R. 2 Q. B. 588.

[2] Merewether *v.* Shaw, 2 Cox, 134; Ainslie *v.* Medlycott, 9 Ves. 21; Evans *v.* Wyatt, 31 Beav. 217.

[3] 2 Cox, 134.

[4] 3 D. & J. 317.

cently the representation may have been made; that a contrary doctrine would strike at the root of fair dealing, and would open a door of escape in all cases of representation as to credit, and indeed in all other cases of false representation. The words of Mr. Justice Story, in Daniel *v.* Mitchell,[1] are much to the same effect. "Nothing," he said, "is clearer in equity than the doctrine that a bargain founded upon false representations made by the seller, although made by innocent mistake, will be avoided. Mistake as well as fraud in any representation of a fact material to the contract is a sufficient ground to set it aside."[2]* There is, however, good reason to doubt whether on principle or authority, the equitable rule with respect to the restitution of property acquired through false representations can be carried so far as the words of these learned judges would warrant. In Rawlins *v.* Wickham, there was, in fact, a duty cast upon the party making the representation to know the truth, so that it is probable that the words of Turner, L. J., though general in terms, should be taken with

[1] 1 Story (Amer.), 172.
[2] Hough *v.* Richardson, 3 Story (Amer.), 691; Doggett *v.* Emerson, *ib.* 733.

* The gist of the inquiry is not whether the party making the statement knew it to be false, but whether the statement made as true was believed to be true, and, therefore, if false, deceived the party to whom it was made. Joyce *v.* Taylor, 6 G. & J. 54; Lewis *v.* McLemon, 10 Yerg. 206; Donelson *v.* Clements, Meigs, 155; Bailey *v.* Jordan, 32 Ala. 50; Oswold *v.* McGehee, 28 Miss. 340; Mitchell *v.* Zimmerman, 4 Tex. 75; Belknap *v.* Sealey, 2 Duer, 570; Smith *v.* Mitchell, 6 Geo. 458; Lockbridge *v.* Foster *et al.*, 4 Scam. 569; Davidson *v.* Moss, 5 How. (Miss.) 673; Shackelford *v.* Handley, 1 A. K. Marsh, 495; McFerran *v.* Taylor, 3 Cranch, 270; Hazard *v.* Irwin, 18 Pick. 95; Bacon *v.* Johnson, 7 Johns. Ch. 194; Henderson *v.* Railroad Co., 17 Tex. 560; Roosevelt *v.* Fulton, 2 Cow. 129; Smith *v.* Richards, 13 Pet. 20. An innocent misrepresentation by mistake will only vitiate a contract when the error between the parties is of such a nature and character as to destroy the consent necessary to its validity; and the rule is further qualified, so that it does not embrace cases to which the rule *caveat emptor* applies. Brooks *v.* Hamilton, 15 Minn. 26.

reference to the particular circumstances of the case. The rule at law being reasonable and fully adequate for the purposes of justice, there is no reason for extending the rule in equity, so far as the words of Turner, L. J., would, if taken generally, warrant. There is no ground for contending that the rule *caveat emptor* does not apply in equity as well as at law,[1] or that a representation amounts any more in equity to a warranty than it does at law. The sound doctrine would seem to be that the rule in equity is the same as the rule at law, and that if, accordingly, a representation be honestly and upon fair and reasonable grounds believed to be true by the party making it, and there be no duty cast on him to know the truth, no claim for the restitution of property acquired through the representation can be maintained in equity, although the representation proves to be untrue,[2] unless the subject-matter be so different in substance from what it was represented to be, as to amount to a failure of consideration.[3]

There is a difference in substance amounting to a failure of consideration, if the property is not of the same nature or description as it was represented to be in the particulars of sale,[4] as where leasehold or copyhold property is described as freehold;[5] or, perhaps, where an under lease is sold as an original lease;[6] or as where upon the sale of an estate let at lease on a rack-rent, such rent is described as a ground-rent;[7] or where there is a misdescription of the quantity of land in regard to acres being statute acres or customary acres;[8] or as

[1] Gorsuch *v.* Cree, 29 L. J. C. P. 309.

[2] See Legge *v.* Croker, 1 Ba. & Be. 514; Bartlett *v.* Salmon, 6 D. M. & G. 33.

[3] See Howland *v.* Norris, 1 Cox, 59; Leslie *v.* Thompson, 9 Ha. 268; Bartlett *v.* Salmon, 6 D. M. & G. 41.

[4] See Taylor *v.* Martindale, 1 Y. & C. C. C. 658; Madeley *v.* Booth, 2 Deg. & S. 722; Stanton *v.* Tattersall, 1 Sm. & G. 536; Price *v.* Macaulay, 2 D. M. & G. 346.

[5] Drewe *v.* Corp, 9 Ves. 368; Pulsford *v.* Richards, 17 Beav. 96, *per* Lord Romilly.

[6] Madeley *v.* Booth, 2 Deg. & S. 718, Henderson *v.* Hudson, 15 W. R. 860. See Darlington *v.* Hamilton, Kay, 550.

[7] Stewart *v.* Alliston, 1 Mer. 26. See Bartlett *v.* Salmon, 6 D. M. & G. 33.

[8] Price *v.* North, 2 Y. & C. 626; Earl of Durham *v.* Legard, 34 Beav. 612.

where a house composed externally partly of brick, and partly of timber, and lath and plaster, is described as a brick-built house.[1]

So, also, there is a difference in substance amounting to a failure of consideration, if there be misrepresentation upon a point material to the due enjoyment of the property; as where a vendor describes land as situated within one mile of a particular town, when it is, in fact, several miles distant therefrom;[2] or where, upon the sale of a lease of a house or shop, the particulars merely stated that the lease contained a restriction against certain specified trades being carried on upon the premises, whereas, in fact, several other trades were forbidden;[3] or where, upon the sale of a piece of land described as "a first-rate building plot of ground," no notice was taken of a right of way passing over it,[4] or of an underground watercourse which third parties had liberty to open, cleanse, and repair, making satisfaction for damage thereby occasioned;[5] or as where a house described to be situated in a fashionable street, was not actually in that street, but merely communicated with it by a passage.[6]

So, also, there is a difference in substance amounting to a failure of consideration, where the property, as described, is not identical with that intended to be sold;[7] or where a material part of the property described has no existence, or cannot be found;[8] or where no title can be shown to it, as where upon the sale of a leasehold house and small yard adjoining, the yard was not included in the lease, but was held from year

[1] Powell *v.* Doubble, Sug. V. & P. 29 Dart, V. & P. 90.

[2] Duke of Norfolk *v.* Worthy, 1 Camp. 337; Pulsford *v.* Richards, 17 Beav. 96. *per* Lord Romilly.

[3] Flight *v.* Booth, 1 Bing. N. C. 370. See Vignoles *v.* Brown, 12 Ir. Eq. 194, 196.

[4] Dykes *v.* Blake, 4 Bing. N. C. 463. See Gibson *v.* D'Este, 2 Y. & C. C. C. 542.

[5] Shackleton *v.* Sutcliffe, 1 Deg. & S. 609.

[6] Stanton *v.* Tattersall, 1 Sm. & G. 529; comp, White *v.* Bradshaw, 16 Jur. 738. See Dart, V. & P. 88, 89.

[7] Leach *v.* Mullett, 3 C. & P. 115.

[8] Robinson *v.* Musgrove, 2 Moo. & R. 92.

to year at a separate rent;[1] or where land was described in the particulars of sale as held under a lease that would expire on a certain day, but it turned out that the tenant of part of the land was entitled under an equitable article to a reversionary term for four lives;[2] or where an annuity was granted, to be calculated on a certain footing by the agent of the grantee, and the calculation proved very inaccurate;[3] or where a man agreed to purchase a share in a partnership businesss, on the footing of a balance-sheet prepared by an accountant employed by the vendor, which turned out to be very inaccurate in certain particulars;[4] or where there was a material variance between the prospectus of a company, on the basis of which a man took shares in the concern, and the memorandum of association by which it was governed;[5] or where a man was released from an obligation, in which he was bound, on a representation that a certain security deposited with the creditor (which proved to be an imaginary one) was a good security.[6]

So, also, it may be laid down, as a general rule, that there is a difference in substance amounting to a failure of consideration, if the misrepresentation or misdescription is of such a nature that the amount of compensation cannot be estimated;[7] as where on the sale of a reversion expectant on the decease of A in case he should have no children, his age was described as sixty-six, instead of sixty-four;[8] or as where on the sale of a wood, the particulars erroneously stated that the average size of the timber approached fifty feet, the number of trees not

[1] Dobell *v.* Hutchinson, 3 A. & A. 355. See Knatchbull *v.* Grueber, 1 Madd. 153; M'Cullock *v.* Gregory, 1 K. & J. 286.

[2] Linehan *v.* Cotter, 7 Ir. Eq. 177. See Collier *v.* Jenkins, You. 298; Sug. V. & P. 304.

[3] Carpmael *v.* Powis, 10 Beav. 44.

[4] Charlesworth *v.* Jennings, 34 Beav. 96.

[5] Ship's Case, 2 D. J. & S. 544; Stewart's Case, L. R. 1 Ch. App. 586; Lawrence's Case, 2, *ib.* 425; Hallows *v.* Fernie, L. R. 3 Eq. 534.

[6] Scholfield *v.* Templer, 4 D. & J. 434.

[7] See Madeley *v.* Booth, 2 Deg. & S. 722.

[8] Sherwood *v.* Robbins, Moo. & M. 194. See 8 Cl. & F. 792.

being stated;[1] or as where the particulars stated the premises to be in the joint occupation of A & B as lessees, when in fact A was only assignee of the lease, and B was a mere joint occupier;[2] or as where the right to coal under the estate was shown to be in other parties, and no means existed of determining its value.[3]

The presence of the words "more or less" in a contract for the sale of a deed of conveyance of land after a statement of the quantity of acres comprised therein does not import a special engagement that the purchaser takes the risk of the quantity. The words must be taken merely to cover a reasonable excess or deficiency. If it turn out that the quantity falls considerably short of what it was represented to be, the court will relieve the purchaser from payment for the deficiency; but a slight variation does not afford a ground for relief.[4]*

[1] Lord Brooke *v.* Roundthwaite, 5 Ha. 298.
[2] Ridgway *v.* Gray, 1 Mac. & G. 109. See Grissell *v.* Peto, 2 Sm. & G. 39.
[3] Smithson *v.* Powell, 20 L. T. 105.
[4] Hill *v.* Bulkley, 17 Ves. 398; Winch *v.* Winchester, 1 V. & B. 375; Portman *v.* Mill, 2 Russ. 570, Sug. V. & P. 324. See Charlesworth *v.* Jennings, 34 Beav. 96; Davis *v.* Shepherd, L. R. 1 Ch. App. 410.

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* Pollock *v.* Wilson, 3 Dana, 25; Quesnel *v.* Woodlief, 2 Hen. & Munf. 173; S. C. 6 Call. 218; Read *v.* Cramer, 1 Green, Ch. 277; Belknap *v.* Sealey, 14 N. Y. 143; Smith *v.* Fly, 24 Tex. 345; Harrell *v* Hill, 19 Ark. 102; Harrison *v.* Talbot, 2 Dana, 258; Bailey *v.* Snyder, 13 S. & R. 160; Thomas *v.* Perry, 1 Pet. C. C. 49; Noble *v.* Googins, 99 Mass. 231; Tarbell *v.* Bowman, 103 Mass. 341.

Where land is sold in gross, for a sum certain, upon a statement of the number of acres, quantity must be regarded as a material consideration with the vendee. Marbury *v.* Stonestreet, 1 Md. 147.

The use of the words "more or less," does not preclude an inquiry into a fraud that may have been committed by either party to a contract. M'Coun *v.* Delaney, 3 Bibb. 46; Harrell *v* Hill, 19 Ark. 102.

The words "more or less," import that quantity did not enter into the essence of the contract, and, in the absence of fraud, neither party can claim relief either for a deficiency or a surplus. Tyson *v.* Hardesty 29 Md. 305; Slothower *v.* Gordon, 23 Md. 1; Hall *v.* Mayhew, 15 Md. 551; Hart *v.* Stull, 3 Md. Ch. 26; S. C. 9 Gill. 451; McCrea *v.* Leonstreth, 17 Penn. 316; Marvin *v* Bennett, 8 Paige, 312; S. C. 26 Wend. 169; Young *v.*

Nor will the court interfere, although the deficiency be considerable, if the risk as to the quantity constituted one of the elements of the agreement, or if the sale was of a thing in

Craig, 2 Bibb. 272; Weaver *v.* Carter, 10 Leigh, 37: Cleaveland *v.* Rogers, 1 A. K. Marsh, 193; Williford *v.* Galbraith, 6 Watts, 117; Perkins *v.* Webster, 2 N. H. 287; Wicker *v.* Creas, 1 Ired. Eq. 351; Pedeus *v.* Owens, Rice's Eq. 55; Ketchum *v.* Sloat, 20 Ohio, 453; Chipman *v.* Briggs, 8 Cal. 76; Powell *v.* Clark, 5 Mass. 355.

The words "more or less," or other equivalent words, should be construed to qualify representations of quantity in such a manner that, if made in good faith, neither party should be entitled to any relief on account of deficiency or surplus. Stebbins *v.* Eddy, 4 Mason, 414; Jones *v.* Plater, 2 Gill. 128.

A parol contract of sale, at a certain price per acre, is so far varied and modified by a subsequent acceptance of a deed with the words "more or less," that the number of acres does not form the basis of the ultimate conveyance, but the land is purchased upon an assumed estimate, and at a gross sum. Smith *v.* Evans, 6 Binn. 182; Stebbins *v.* Eddy, 4 Mason, 414.

Far too much significance has been sometimes allowed to these and similar words. Their primary use is to show that all the land embraced within the description, is intended to pass, and in that sense they are often important in the construction of an instrument. They may be decisive upon the question of how much consideration is to be paid, or of mere compensation where actual mistake does not appear. And where misrepresentation and mistake are claimed, they certainly qualify the statement of quantity, which the instrument otherwise imports. A deed which describes the land, and states the number of acres, although with the words "more or less," clearly imports that there is not a great deficiency or excess. If the deficiency is one half, the instrument carries, on its face, a gross misrepresentation. Such words do not import that there is a special engagement that the purchaser shall take the risk of the quantity. Their presence in a contract or deed may render it more difficult to prove such a mistake as will justify the interference of equity, but they are not equivalent to a stipulation that the mistake, when ascertained, shall not be a ground for relief. Belknap *v.* Sealey, 14 N. Y. 143.

The deficiency must be such as will naturally raise the presumption of fraud, imposition, or mistake in the very essence of the contract. Stebbins *v.* Eddy, 4 Mass. 414.

When the metes and bounds are pointed out, the purchaser takes the risk of the quantity. Grantland *v.* Wright, 2 Munf. 179; Dalton *v.* Rust, 22 Tex. 133.

When the deficiency is considerable, the contract may be set aside for misrepresentation, although the sale is in gross. Pringle *v.* Samuel, 1 Litt. 43; Kent *v.* Carcaud, 17 Md. 291.

gross and not by admeasurement,[1] or if there was a special stipulation that the quantities shall be taken as stated.[2]

Though a party making a representation may at the time believe it to be true, and have made it innocently, yet if after discovering that it was untrue he suffers the other party to continue in error, and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of a court of equity, a fraudulent misrepresentation, even though not so originally.[3] If, moreover, a man makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party who made the representation, but not to the knowledge of the party to whom the representation was made, and are so altered that the alteration may affect the course of conduct which may be pursued by the party to whom the representation was made, it is the duty of the party who has made the representation to communicate to the party to whom he made it, the alteration of those circumstances. The party to whom the representation has been made, will not be held bound in equity, unless such a communication has been made.[4]

In considering whether a man has reasonable grounds for believing a representation to be true, the position in which he is placed, and the sources from which he has drawn his information, must be taken into consideration.[5] If a man be asked to give an account as to the fortune or circumstances of another, statements appearing in wills, deeds, marriage settlements, &c., are reasonable sources of information. He cannot

[1] Anon., 2 Freem. 107; Twyford *v.* Wareup, Finch, 310; Baxendale *v.* Seale, 19 Beav. 601; Stebbins *v.* Eddy, 4 Mas. (Amer.) 414; Marvin *v.* Bennett, 26 Wend. (Amer.) 169; Morris Canal Co. *v.* Emmett, 9 Paige (Amer.) 168. See Leslie *v.* Tompson, 9 Ha. 268.

[2] Nicoll *v.* Chambers, 11 C. B. 996. See Sug. V. & P. 324, 327; Cordingley *v.* Cheeseborough, 3 Giff. 506.

[3] Reynell *v.* Sprye, 1 D. M. & G. 660, 709.

[4] Traill *v.* Baring, 33 L. J. Ch. 521.

[5] Cullen's Trustee *v.* Johnston, 3 Dec. of Court of Session, 3d series, p. 936.

be called on if the statements therein appearing turn out to be incorrect, to make good his representation.[1] A man, however, must examine into the truth of representations made to him by others, before putting them forward as true, or as of his own knowledge. If a man makes a representation in such a manner as to import a knowledge of the facts to which the representation refers, and the representation is not materially qualified by a reference to any other person as the source of information, he cannot be heard to say, on a claim for the rescission of the transaction, if the representation proves to be untrue, that he made the representation on the authority of his agent, and honestly believed it to be true. If a company give credit to, and assume as true the reports which are made to them by their agents, and represent as facts the matters stated in those reports, and persons are induced to enter into contracts on the foundation of the assumption of the representations which have been made to them, they cannot be heard to say, on a claim for a rescission of the transaction, if the representations prove to be untrue, that they honestly believed them to be true. If the company, instead of stating a thing as a fact, state merely that they have received reports from their agents, and that they have reason to believe the reports to be true, the case may be different.[2] It may be material, where proceedings at law are aimed against a man with a view to obtain damages from him personally for false representations, that he may have believed statements made to him by agents to be true, but it is immaterial where the transaction is sought to be set aside.[3]

A misrepresentation, however, is a fraud at law, although made innocently, and with an honest belief in its truth, if it

[1] Ainslie *v.* Medlycott, 9 Ves. 21; Evans *v.* Wyatt, 31 Beav. 217.

[2] Smith's Case, Re Reese River Silver Mining Co., L. R. 2 Ch. App. 604, 611, 615; Ross *v.* Estates Investment Co., L. R. 3 Eq. 138; Henderson *v.* Lacon, L. R. 5 Eq. 261.

[3] Smith's Case, Re Reese River Silver Mining Co., L. R. 2 Ch. App. 615; Henderson *v.* Lacon, L. R. 5 Eq. 261.

be made by a man who ought in the due discharge of his duty to have known the truth, or who formerly knew, and ought to have remembered, the fact which negatives the representation, and be made under such circumstances or in such a way as to induce a reasonable man to believe that it was true, and was meant to be acted on, and has been acted on by him accordingly to his prejudice. If a duty is cast upon a man to know the truth, and he makes a representation in such a way as to induce a reasonable man to believe that it is true, and is meant to be acted on, he cannot be heard to say, if the representation proves to be untrue, that he believed it to be true, and made the misstatement through mistake, or ignorance, or forgetfulness.[1]

A statement which amounts to a warranty, must be distinguished from a statement which amounts merely to a representation. A representation is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstance relating to it.[2] A representation is not a part of the written instrument, but is collateral to it, and entirely independent of it.[3] The insertion of the representation in the instrument does not alter its nature. Though a representation is sometimes contained in a written instrument, it is not an integral part of the contract, and consequently the contract is not broken, though the representation proves to be untrue.[4] In order that a statement or representation may amount to a warranty, it must appear that it was

[1] Burrowes *v.* Lock, 10 Ves. 470; Moens *v.* Heyworth, 10 M. & W. 147; Pulsford *v.* Richards, 17 Beav. 95; Ayre's Case, 25 Beav. 522; Price *v.* Macaulay, 2 D. M. & G. 345; Hutton *v.* Rossiter, 7 D. M. & G. 9; Rawlins *v.* Wickham, 3 D. & J. 304; Slim *v.* Croucher, 1 D. F. & J. 523; Swan *v.* North British Australian Co., 2 H. & C. 183; Henderson *v.* Lacon, L. R. 5 Eq. 262; comp. Merewether *v.* Shaw, 2 Cox, 134, where a brother made, through misconception, a false representation respecting his sister's fortune to a man who was about to marry her, and did afterwards marry her. See, also, Ainslie *v.* Medlycott, 9 Ves. 21; Evans *v.* Fowler, 21 Beav. 217.

[2] Behn *v.* Burness, 3 B. & S. 753.

[3] Coram *v.* Sweeting, 2 Wms. Saund. 201. See Kain *v.* Old, 2 B. & C. 634, *per* Lord Tenterden; Cornfoot *v.* Fowke, 6 M. & W. 370, *per* Lord Cranworth.

[4] Behn *v.* Burness, 3 B. & S. 753.

intended to form a substantive part of the contract.[1] * A warranty is an express or implied statement of something which the party making it undertakes shall be a substantive part of the contract, and though part of the contract, yet collateral to the express object of it.[2] A representation of intention does not amount to a warranty.[3] If a representation or statement is not of the essence of the contract, there is no warranty.[4] The circumstance of a man selling a particular thing by its proper description is not a warranty that the thing is of that description. If the thing does not answer the description, there is not a breach of warranty, but a non-compliance with a contract which he has engaged to fulfil.[5] To constitute a warranty, it is not necessary that the word "warrant" should occur in the bargain.[6] Nor is it necessary that the statement or representation should be simultaneous with the close of the bargain. If it be part of the contract, it matters not at what period of the negotiation it was made.[7] If a statement amounts to a warranty, the party making it is bound by his warranty. The fact that he may have made the statement in honest mistake, or that the statement may be not in a material matter, cannot be taken into consideration.[8]

[1] Behn *v.* Burness, 3 B. & S. 754.

[2] Chanter *v.* Hopkins, 4 M. & W. 404, *per* Lord Abinger; Stucley *v.* Baily, 1 H. & C. 415, *per* Martin, B.

[3] Benham *v.* United Guarantee, &c. Assurance Co., 7 Exch. 744.

[4] Cranston *v.* Marshal, 5 Exch. 402; Taylor *v.* Bullen, *ib.* 779; Vernede *v.* Weber, 1 H. & N. 311.

[5] Chanter *v.* Hopkins, 4 M. & W. 404, *per* Lord Abinger; Stucley *v.* Baily, 1 H. & C. 415, *per* Martin, B.

[6] Hopkins *v.* Tanqueray, 15 C. B. 137, *per* Jervis, C. J.; Stucley *v.* Baily, 1 H. & C. 417.

[7] Hopkins *v.* Tanqueray, 15 C. B. 137, *per* Jervis, C. J.

[8] Attwood *v.* Small, 6 Cl. & Fin. 232; Anderson *v.* Fitzgerald, 4 H. L. 504, *per* Lord Cranworth; Tannerman *v.* White, 10 C. B. N. S. 844; Behn *v.* Burness, 3 B. & S. 754, 759.

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* In order to constitute a warranty no particular form of words is necessary. The word warrant need not be used. A bare representation or assertion, if so intended and understood by the parties, will amount to a warranty. But no matter how positive the representation of the vendor may be, it will be regarded as an expression of his belief or opinion,

The term "warranty" is used in two senses. It is either a condition on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract altogether, and so be released from performing his part of it, or it is an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for compensation in damages. The question whether a statement, though intended to be a substantive part of the contract, is a condition precedent, or an independent agreement, is sometimes raised in the construction of charter-parties, with reference to stipulations that some future thing shall be done or shall happen, and has given rise to very nice distinctions. Thus a statement that a vessel is to sail, or be made ready to receive a cargo, on or before a given day, has been held to be a condition, while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement.[1] If the statement be a condition, and it be not complied with, the party to whom it is made may, if he be so minded, repudiate the contract, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty ceases to be available as a condition, and becomes a warranty in the narrower sense of the term, that is to say, a stipulation by way of agreement, for the breach of which a compensation may be sought in damages. Accordingly, if a specific thing has been sold, with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee having been thus benefited by the partial execution of the

[1] Behn *v.* Burness, 3 B. & S. 754.

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unless it was intended and received as a stipulation. Barnett *v.* Stanton, 2 Ala. 181; Endor *v.* Scott, 13 Ill. 35.

contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special condition to that effect in the contract), but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed. Still, if he receives the thing as sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action for damages.[1]

Affirmations in policies of insurance are in the nature of warranties. In the case of policies of marine insurance, and policies against fire, a warranty is also a condition. It is an implied condition of the validity of the policy, that the party proposing the insurance should make a true and complete representation respecting the property which he seeks to insure. Such policies are therefore vitiated by any material misrepresentations, even though not fraudulently made.[2] In the case of life assurances, however, it is not an implied condition of the validity of the policy that the party proposing the insurance should make a true and complete representation respecting the life proposed for insurance. If there be no express warranty or condition on the part of the insured, a policy of life assurance is not vitiated by false representations, unless there be fraud.[3] If there be a proviso in a policy of assurance, that any untrue statements shall avoid the policy,

[1] Behn *v.* Burness, 3 B. & S. 755.

[2] Carter *v.* Boehm, 3 Burr. 1905; Moens *v.* Heyworth, 10 M. & W. 157, *per* Lord Wensleydale; Anderson *v.* Fitzgerald, 4 H. L. 484; Sillem *v.* Thornton, 3 E. & B. 868; Stokes *v.* Cox, 1 H. & N. 533; Bannerman *v.* White, 10 C. B. N. S. 860.

[3] Wheelton *v.* Hardisty, 8 E. & B. 232, *infra*.

the policy is vitiated by any statement false in fact, whether material or not.[1]

In order that a misrepresentation may support an action at law, or be of any avail whatever as a ground for relief in equity, it is essential that it should be material in its nature,[2]* and should be a determining ground of the transaction.[3]† The misrepresentation must, in the language of the Roman law, be *dolus dans locum contractui*.[4] There must be the assertion of a fact on which the person entering into the transaction relied, and in the absence of which it is reasonable to infer that he would not have entered into it at all,[5]‡ or at least not on the same terms.[6] Both facts must concur; there must be false and material representations, and the party seeking relief should have acted upon the faith and credit of such

[1] Anderson *v.* Fitzgerald, 4 H. L. 484; Gazenove *v.* British Equitable Assurance Co., 6 C. B N. S. 437; comp. Perrins *v.* Marine, &c. Insurance Co., 2 El. & El. 317.

[2] Jennings *v.* Broughton, 5 D. M. & G. 126. See Geddes *v.* Pennington, 5 Dow. 159.

[3] Merewether *v.* Shaw, 2 Cox, 134; De Manneville *v.* Crompton, 1 V. & B. 354; Jameson *v.* Stein, 21 Beav. 9; Robson *v.* Earl of Devon, 4 Jur. N. S. 245, 248; Goldicutt *v.* Townsend, 28 Beav. 445; Jennings *v.* Broughton, 5 D M. & G. 136; Denne *v.* Light, 8 D. M. & G. 774.

[4] Fraud is divided by the civilians into *dolus dans locum contractui* and *dolus incidens*, or accidental fraud. The former is that which has been the cause or determining motive of the transaction; that, in other words, without which the party defrauded would not have contracted. Incidental or accidental fraud is that by which a man, otherwise intending to contract, is deceived as to some accessory or accident of the contract: for example, as to the quality of the object of sale or its price. The determination of the question as to the character of the *dolus* rests in each particular case with the court. Accidental or incidental fraud is not a ground for avoiding a transaction, but simply subjects the party to an action for damages, Duranton, vol. X, liv. 3, s. 169; Toull. Dr. Civ., liv. 3, tit. 3. c. 2, s. 5, art. 90; Bedarride, sur Dol. p. 45. This distinction does not obtain in the common law, and is not admitted in equity.

[5] Pulsford *v.* Richards, 17 Beav. 87, 96.

[6] 6 M. & W. 378, *per* Lord Abinger. See Small *v.* Attwood, You. 461.

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* Smith *v.* Richards, 13 Pet. 26; Coffee *v.* Newsom, 2 Kelly, 442; McDonald *v.* Trafton, 15 Me. 225; Cunningham *v.* Smith, 10 Gratt. 255; Gillett *v.* Phelps, 12 Wis. 392; Taylor *v.* Fleet, 1 Barb. 479.

† Morris Canal Co. *v.* Emmett, 9 Paige, 168; Winston *v.* Gwathmey, 8 B. Mon. 19; Halls *v.* Thompson, 1 Smed. & Marsh, 443.

‡ Daniel *v.* Mitchell, 1 Story, 172; Hazard *v.* Irvin, 18 Pick. 95; Bradley *v.* Bosley, 1 Barb. 125.

representations.[1]* To say that statements are false is one thing; to say that a man was deceived by them to enter into a transaction is another thing.[2]† A misrepresentation to be material must be one necessarily influencing and inducing the transaction,[3]‡ and affecting and going to its very essence and substance.[4] Misrepresentations which are of such a nature as, if true, to add substantially to the value of property,[5] or are calculated to increase substantially its apparent value,[6] are material. A misrepresentation goes for nothing unless it is a proximate and immediate cause of the transaction.[7] It is not enough that it may have remotely or indirectly contributed to the transaction or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place. The transaction must be a necessary and not merely an indirect result of the representation.[8] It is not however necessary that the representation should have been the sole cause of the transaction. It is enough that it may have constituted a material

[1] Hough *v.* Richardson, 3 Story (Amer.), 690, *per* Story, J.

[2] Jennings *v.* Broughton, 5 D. M. & G. 126.

[3] *Re* Reese River Silver Mining Co.; Smith's Case, L. R. 2 Ch. App. 611.

[4] Hallows *v.* Fernie, L. R. 3 Eq. 536.

[5] Price *v.* Macaulay, 2 D. M. & G. 344; Jennings *v.* Broughton, 5 D. M. & G. 126.

[6] Small *v.* Attwood, You. 461; Dimmock *v.* Hallett, L. R. 2 Ch. App. 27.

[7] Barry *v.* Crosskey, 2 J. & H. 1; New Brunswick, &c. Railway Co. *v.* Conybeare, 9 H. L. 711; Barrett's Case, 3 D. J. & S. 30. See Geddes *v.* Pennington, 5 Dow. 159.

[8] Burnes *v.* Pennell, 2 H. L. 497, 531; Nicoll's Case, 3 D. & J. 387, 439; Barry *v.* Crosskey, 2 J. & H. 1; New Brunswick &c. Railway Co. *v.* Conybeare, 9 H. L. 711. See Atwood *v.* Small, 6 Cl. & Fin. 232, 447; Jameson *v.* Stein, 21 Beav. 5; Robson *v.* Earl of Devon, 4 Jur. N. S. 245; Wheelton *v.* Hardisty, 8 E. & B. 232; Smith *v.* Kay, 7 H. L. 750, 775.

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* McDonald *v.* Trafton, 15 Me. 225.

The representations need not be the sole inducement. It is sufficient if the party would not have entered into the contract if the false representations had not been made. Shaw *v.* Stine, 8 Bosw. 157.

† Clark *v.* Everhart, 63 Penn. 347; Boyce *v.* Watson, 20 Geo. 517.

‡ Morgan *v.* Snapp, 7 Ind. 537; Hill *v.* Bush, 19 Ark. 522; Yeates *v.* Prior, 6 Eng. 58.

inducement. If any one of several statements, all in their nature more or less capable of leading the party to whom they are addressed to adopt a particular line of conduct, be untrue, the whole transaction is considered as having been fraudulently obtained, for it is impossible to say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed.[1] A man who has made a false representation in respect of a material matter must, in order to be able to rely on the defence that the transaction was not entered into on the faith of the representation, be able to prove to demonstration that it was not relied on.[2] It is not enough for him to say that there were other representations by which the transaction may have been induced;[3] nor can he be heard to say what the other party would have done, had no misrepresentation been made.[4]

A misrepresentation to be of any avail whatever must enure to the date of the transaction in question.[5] If a man to whom a representation has been made, knows at the time, or discovers before entering into a transaction, that the representation is false,[6]* or resorts to other means of knowledge open to him, and chooses to judge for himself in the matter, he cannot avail himself of the fact that there has been misrepresentation, or say that he has acted on the faith of the representation.[7]† Where, accordingly, an iron company had

[1] Reynell *v.* Sprye, 1 D. M. & G. 708; Jennings *v.* Broughton, 5 D. M. & G. 126; Clarke *v.* Dickson, 6 C. B. N. S. 453; Smith *v.* Kay, 7 H. L. 750, 775

[2] Rawlins *v.* Wickham, 3 D. & J. 304; Nicoll's Case, *ib.* 337; Smith *v.* Kay, 7 H. L. 750, 775; Kisch *v.* Central Venezuela Railway Co. 3 D. J. & S. 122.

[3] Nicoll's case, 3 D. & J. 387, 439.

[4] Reynell *v.* Sprye, 1 D. M. & G. 660; Smith *v.* Kay, 7 H. L. 750, 770; Traill *v.* Baring, 33 L. J. Ch. 521, 527.

[5] Irvine *v.* Kirkpatrick, 7 Bell, Sc. Ap. 186.

[6] *Ib.*; Vigers *v.* Pike, 8 Cl & Fin. 650; Lord Brooke *v.* Roundthwaite, 5 Ha. 298, 306; Nelson *v.* Stocker, 4 D. & J. 465.

[7] Lysney *v.* Selby, 2 Lord Raymond, 1118, 1120; Pike *v.* Vigers, 2 Dr. &

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* Anderson *v.* Burnett, 5 How. (Miss.) 165; Hughes *v.* Sloan, 2 Ark 116.

† Hough *v.* Richardson, 3 Story, 659; Vesey *v.* Doton, 3 Allen, 380 —

sent some of their directors for the express purpose of verifying the representations of a man respecting his works, who expressed their satisfaction with the proofs produced, it was held that the company had, by choosing to judge for themselves in the matter, precluded themselves from being able to say that they had been deceived by the representations of the vendor, and that it was their own fault if they had not availed themselves of all the knowledge, or means of knowledge, open to them.[1] So, also, where a man had, before purchasing shares in a mine, visited the mine and examined into its condition, it was held that he had not relied on representations made to him by the vendor, and was not entitled to avoid the contract, on the ground that they were false, the alleged misstatements being such as he was competent to detect.[2] "Cases," said Lord Langdale, in Clapham *v.* Shilleto,[3] "frequently occur in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied on by the other. If the party to whom the

Wal. 261; Clarke *v.* Macintosh, 4 Giff. 134. See Farebrother *v.* Gibson, 1 D. & J. 602.

[1] Attwood *v.* Small, 6 Cl. & Fin. 232.

[2] Jennings *v.* Broughton, 17 Beav. 234, 5 D. M. & G. 126. See Lowndes *v.* Lane, 2 Cox, 363; Vigers *v.* Pike, 8 Cl. & Fin. 562, 650; Robson *v.* Lord Devon, 4 Jur. N. S. 245; Haywood *v.* Cope, 25 Beav. 148; Nelson *v.* Stocker, 4 D. & J. 465; New Brunswick &c. Railway Co. *v.* Conybeare, 9 H. L. 711, 730.

[3] 7 Beav. 149.

The representation must have been honestly confided in. Casey *v.* Allen, 1 A. K. Marsh, 465.

A person is not bound by a representation so clearly and obviously differing from the fact, that every person having the use of the common organs of sensation must know it to be erroneous; for reliance is to be placed upon the knowledge which these offer, rather than upon the statements of any one. Irving *v.* Thomas, 18 Me. 418.

If the misrepresentation renders the examination less perfect and full, or makes the statements of the party to be in part confided in, as in respect to details, extending personal inquiry only to general matters and general appearances, the fraud vitiates the whole contract. Mason *v.* Crosby, 1 Wood & Min. 342; Smith *v.* Babcock, 2 Wood & Min. 246.

representations were made, himself resorted to the proper means of verification before entering into the contract, it may appear that he relied on the results of his own investigation and inquiry, and not upon the representations made to him by the other party;[1]* or if the means of investigation and verification be at hand, and the attention of the party receiving the representation be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representation made to him may be excluded.[2]† Again, when we are endeavoring to ascertain what reliance has been placed on representations, we must consider them with reference to the subject-matter,

[1] See Lowndes *v.* Lane, 2 Cox, 363; Pickering *v.* Dowson, 4 Taunt. 779; Attwood *v.* Small, 6 Cl. & Fin. 232; Jennings *v.* Broughton, 17 Beav. 234, 5 D. M. & G. 126; Haywood *v.* Cope, 25 Beav. 140; Hough *v.* Richardson, 3 Story (Amer.) 691; Doggett *v.* Emerson, *ib.* 733; Mason *v.* Crosby, 1 Wood. & M. (Amer.) 342.

[2] See Lowndes *v.* Lane, 2 Cox, 363; Jennings *v.* Broughton, 17 Beav. 234, 5 D. M. & G. 126; Farebrother *v.* Gibson, 1 D. & J. 602; Clark *v.* Macintosh, 4 Giff. 143; New Brunswick &c. Railway Co. *v.* Conybeare, 9 H. L. 711; Hough *v.* Richardson, 3 Story (Amer.). 691; Doggett *v.* Emerson, *ib.* 733; Mason *v.* Crosby, 1 Wood & M. (Amer.) 342; Johnson *v.* Taber, 6 Seld. (Amer.) 319; Gordon *v.* Parmelee, 2 Allen (Amer.) 214.

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* Halls *v.* Thompson, 1 Smed. & Mar. 443; Perkins *v.* Rice, 6 Litt. 218.

† There is no misrepresentation, if the fact is one of which every man is equally capable of judging for himself. Bell *v.* Henderson, 6 How. (Miss.) 311; Mississippi Union Bank *v.* Wilkinson, 3 Smed. & Mar. 78.

A purchaser is bound to exercise ordinary prudence and discretion, and if the means of knowledge are within his power, and he neglects to make the proper inquiry, he loses his remedy against the vendor for any fraudulent representation the latter may make. Bell *v.* Byerson, 11 Iowa, 233; Schermerhorn *v.* George, 13 Abb. Pr. 315; White *v.* Seaver, 25 Barb. 235; Burton *v.* Willers, 6 Litt. 32.

Where a party is, from the circumstances, induced to rely upon the representations of the vendor, he may rescind the contract, although the means of obtaining information were open to him. Mattock *v.* Todd, 19 Ind. 130.

and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, or has not equal means of knowledge, and a contract is entered into, after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made to him by him who was supposed to be better informed;[1] * but if the subject is in its nature uncertain, if all that is known is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, it is not easy to presume that the representations made by the one would have much, or any, influence on the other."[2] †

The allegation of misrepresentation may be effectually met by proof that the party complaining was well aware and cognizant of the real facts of the case, but the proof of

[1] See Lysney *v.* Selby, 2 Lord Raym. 1118–1120; Lowndes *v.* Lane, 2 Cox, 363; Edwards *v.* M'Cleay, 2 Sw. 289; Vernon *v.* Keys, 12 East, 637, 4 Taunt. 488; Martin *v.* Cotter, 3 J. & L. 506; Reynell *v.* Sprye, 1 D. M. & G. 660; Price *v.* Macaulay, 2 D. M. & G. 339; Rawlins *v.* Wickham, 3 D. & J. 304; Strangways *v.* Bishop, 29 L. T. 120; Higgins *v.* Samels, 2 J. & H. 460; Warner *v.* Daniels, 1 Wood. & M. (Amer.) 90; Mason *v.* Crosby, 2 Wood. & M. (Amer.) 353.

[2] See Lowndes v. Lane, 2 Cox, 363; Harris *v.* Kemble, 1 Sim. 111, 5 Bligh, 730; Attwood *v.* Small, 6 Cl. & Fin. 232; Knight *v.* Marjoribanks, 2 H. & Tw. 316; Jennings *v.* Broughton, 17 Beav. 234, 5 D. M. & G. 126; Haywood *v.* Cope, 25 Beav. 140; Clarke *v.* Macintosh, 4 Giff. 143; National Exchange Co. *v.* Drew, 23 Dec. of Ct. of Session, 2d series, p. 1; Hough *v.* Richardson, 3 Story (Amer.) 691; Johnson *v.* Taber, 6 Seld. (Amer.) 319.

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* Picard *v.* McCormick, 11 Mich. 68; Harvey *v.* Smith, 17 Ind. 272; Nowlan *v.* Cain, 3 Allen, 261; Beard *v.* Campbell, 2 A. K. Marsh, 125; Narcissa *v.* Wathan, 2 B. Mon 241; Spence *v.* Whitaker, 3 Port. 297.

† Halls *v.* Thompson, 1 Smed. & Mar. 443; Strong *v.* Peters, 2 Root, 33; Glasscock *v.* Minor, 11 Mo. 655; Fallon *v.* Hood, 34 Penn. 365; Farrar *v.* Alston, 1 Dev. 69; Saunders *v.* Hatterman, 2 Ired. 32; Moore *v.* Turbeville, 2 Bibb. 602.

knowledge must be clear and conclusive. A man who, by misrepresentation or concealment, has misled another, cannot be heard to say that he might have known the truth by proper inquiry; but must, in order to be able to rely on the defence that he knew the representation to be untrue, be able to establish the fact upon incontestible evidence, and beyond the possibility of a doubt.[1] *

If the subject-matter is not property in this country, where probably independent inquiry would be made and inspection might take place, but property at such a distance that any person purchasing it is obliged to rely on the statement made with respect to it, the argument is the stronger that reliance has been placed on the representations.[2] † If a definite or particular statement be made as to the contents of property, and the statement be untrue, it is not enough that the party to whom the representation was made may have been acquainted with

[1] Dyer *v.* Hargrave, 10 Ves. 505; Harris *v.* Kemble, 5 Bligh, 730; Vigers *v.* Pike, 8 Cl. & Fin. 562, 650; Wilson *v.* Short, 6 Ha. 366, 375; Shackleton *v.* Sutcliffe, 1 Deg. & S. 609; Martin *v.* Cotter, 3 J. & L. 496, 506; Reynell *v.* Sprye, 8 Ha. 257; Price *v.* Macaulay, 2 D. M. & G. 339; Kisch *v.* Central Venezuela Railway Co. 3 D. J. & S. 122; Central Railway of Venezuela Co. *v.* Kisch, L. R. 2 App. Ca. 114; Lawrence's Case, L. R. 2 Ch. App. 422. See Nelson *v.* Stocker, 4 D. & J. 465.

[2] Smith's Case; Re Reese River Silver Mining Co., L. R. 2 Ch. App. 614.

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* Boyce *v.* Grundy, 3 Pet. 210; Young *v.* Harris, 2 Ala. 108; Clapton *v.* Cogart, 3 Smed. & Mar. 363; Connersville *v.* Wadleigh, 7 Blackf. 102; Anderson *v.* Burnett, 5 How. (Miss.) 165.

The rule that there is no reliance where the means of information are equally open to both parties, does not apply to misrepresentations whereby a surety obtains his release from a bond. Hoitt *v.* Holcomb, 32 N. H. 185.

† Wherever a sale is made of property not present but at a remote distance, which the vendor knows the purchaser has never seen, but which he buys upon the representation of the vendor, relying on its truth, then the representation in effect amounts to a warranty; at least that the vendor is bound to make good the representation. Smith *v.* Richards, 13 Pet. 26; Babcock *v.* Case, 61 Penn. 427; Spalding *v.* Hedges, 2 Barr, 240; Miner *v.* Medbury, 6 Wis. 295; Bean *v.* Herrick, 12 Me. 262; Camp *v.* Camp, 2 Ala. 632.

the property. A very intimate knowledge with the premises will not necessarily imply knowledge of their exact contents, while the particularity of the statement will naturally convey the notion of exact admeasurement.[1] The fact that he had the means of knowing or of obtaining information of the truth which he did not use is not sufficient.[2] It is not indeed enough that he may have been wanting in caution. A man who has made false representations, by which he has induced another to enter into a transaction, cannot turn round on the person whom he has defrauded and say that he ought to have been more prudent and ought not to have concluded the representations to be true in the sense which the language used in the prospectus naturally and fairly imports.[3] Nor is it enough that there may be circumstances in the case which, in the absence of the representation, might have been sufficient to put him on inquiry. The doctrine of notice has no application where a distinct representation has been made. A man to whom a particular and distinct representation has been made is entitled to rely on the representation and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn.[4] He is not bound to inquire unless something has happened to excite suspicion,[5] or unless there is something in the case or in the terms of the representation to put him on inquiry.[6] The party who has made the representation cannot

[1] Hill *v.* Buckley, 17 Ves. 394. See King *v.* Wilson, 6 Beav. 124.

[2] Lysney *v.* Selby, 2 Lord Raym. 1118, 1120; Dobell *v.* Stevens, 3 B. & C. 623; Rawlins *v.* Wickham, 3 D. & J. 319.

[3] New Brunswick &c. Railway Co. *v.* Muggeridge, 1 Dr. & Sm. 382.

[4] Grant *v.* Munt, Coop. 173; Van *v.* Corpe, 3 M. & K. 269; Flight *v.* Barton, *ib.* 282; Dobell *v.* Stevens, 3 B. & C. 623; Pope *v.* Garland, 4 Y. & C. 394; Wilson *v.* Short, 6 Ha. 366, 377; Drysdale *v.* Mace, 2 Sm. & G. 225, 230, 5 D. M. & G. 103; Cox *v.* Middleton, 2 Drew. 209; Grosvenor *v.* Green, 5 Jur. N. S. 117; Rawlins *v.* Wickham, 3 D. & J. 318; Kisch *v.* Central Venezuela Railway Co., 3 D. J. & S. 122; Smith *v.* Reese River Silver Mining Co., L. R. 2 Eq 264.

[5] Rawlins *v.* Wickham, 3 D. & J. 304. See Farebrother *v.* Gibson, 1 D. & J. 602.

[6] Kent *v.* Freehold Land and Brick making Co., L. R. 4 Eq. 598.

be allowed to say that he told him where further information was to be got, or recommended him to take advice, and even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other. No man can complain that another has relied too implicitly on the truth of what he himself stated.[1] If a vendor has stated in his proposals the value of the property, he cannot, except under special circumstances, complain that the purchaser has taken the value of the property to be such as he represented it to be.[2] The effect of what would be otherwise notice may be destroyed not only by actual misrepresentation but by anything calculated to deceive or even to lull suspicion upon a particular point.[3] * A vendor of property on lease, for instance, is not justified in parading upon his particulars of sale the existence of covenants beneficial to the estate which he knows or has good reason to believe can not be enforced.[4]

The maxim *caveat emptor* does not apply where there is a positive misrepresentation, essentially material to the subject in question, provided proper diligence be used by the purchaser in the course of the transaction.[5] The rule at least of *caveat emptor*, where there is misrepresentation, if applicable

[1] Reynell *v.* Sprye, 1 D. M. & G. 660, 710; Rawlins *v.* Wickham, 3 D. & J. 318; Smith *v.* Reese River Silver Mining Co., L. R. 2 Eq. 264; Colby *v.* Gadsden, 15 W. R. 1185. See Harris *v.* Kemble, 5 Bligh, 730.

[2] Perfect *v.* Lane, 3 D. F. & J. 369.

[3] Dykes *v.* Blake, 4 Bing. N. C. 463; Bartlett *v.* Salmon, 6 D. M. & G. 41; Darlington *v.* Hamilton, Kay, 550; Smith *v.* Harrison, 26 L. J. Ch. 412; Sheard *v.* Venables, 36 L. J. Ch. 922; Dart, V. & P. 75.

[4] Flint *v.* Woodin, 9 Ha. 618.

[5] Lowndes *v.* Lane, 2 Cox, 363; Robson *v.* Earl of Devon, 4 Jur. N. S. 245.

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* Camp *v.* Camp, 2 Ala. 632; Parham *v.* Randolph, 4 How. (Miss.) 435. When the misrepresentation relates to the title, the fact that the deed is on record is immaterial. Parham *v.* Randolph, 4 How. (Miss.) 435

at all, must be applied with great caution.[1]* Nor will a condition in particulars of sale that misdescriptions or errors in particulars of sale shall not annul the sale cover a fraudulent misrepresentation.[2]

A misrepresentation, to be material, should be in respect of an ascertainable fact, as distinguished from a mere matter of opinion.[3]† A representation which merely amounts to a statement of opinion, judgment, probability, or expectation, or is vague and indefinite in its nature and terms, or is merely a loose, conjectural, or exaggerated statement, goes for nothing, though it may not be true, for a man is not justified in placing reliance on it.[4]‡ An indefinite representation ought to put the person to whom it is made upon inquiry.[5] If he chooses to put faith in such a statement, and abstains from inquiry, he has no ground of complaint.[6] Mere exaggeration is a totally

[1] Colby *v.* Gadsden, 15 W. R. 1185.

[2] Duke of Norfolk *v.* Worthy, 1 Camp. 337; Fenton *v.* Brown, 14 Ves. 144; Stewart *v.* Alliston, 1 Mer. 26; Trower *v.* Newcombe, 3 Mer. 704; Shackleton *v.* Sutcliffe, 1 Deg. & S. 609; Leslie *v.* Tompson, 9 Ha. 273. See Edwards *v.* Wickwar, L. R. 1 Eq. 68.

[3] Lysney *v.* Selby, 2 Lord Raym. 1118; Brunton *v.* Lister, 3 Atk. 386; Vernon *v.* Keys, 12 East, 632, 4 Taunt. 448; Jennings *v.* Broughton, 5 D. M. & G. 134; Higgins *v.* Samels, 2 J. & H. 464; Leyland v. Illingworth, 2 D. F. & J. 248.

[4] Haycraft *v.* Creasy, 2 East, 92; Drysdale *v.* Mace, 5 D. M. & G. 107; Kisch *v.* Central Venezuela Railway Co. 3 D. J. & S. 122; Denton *v.* Macneil, L. R. 2 Eq. 352; Dimmock *v.* Hallet, L. R. 2 Ch App. 27.

[5] Lord Brooke *v.* Roundthwaite, 5 Ha. 304; Dimmock *v.* Hallett, L. R. 2 Ch. App. 27.

[6] *Ib.*

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* The line which separates cases where the rule of *caveat emptor* applies from others which call for relief, is not defined with entire precision. Each one will rest, in some measure, upon its peculiar circumstances. Bean *v.* Herrick, 12 Me. 262; Pringle *v.* Samuel, 1 Litt. 43.

† Davis *v.* Meeker, 5 Johns. 354; Manney *v.* Porter, 3 Humph. 347.

‡ Payne *v.* Smith, 20 Geo. 654; Foley *v.* Cowgill, 6 Blackf. 18; Turner *v.* Navigation Co. 2 Dev. Ch. 236; Halls *v.* Thompson, 1 Smed. & Mar. 443.

A failure in a speculation does not constitute ground for relief. Turner *v.* Navigation Co. 2 Dev. Ch. 236.

A misrepresentation which is calculated to put common prudence off its guard, is sufficient. Bean *v.* Herrick, 12 Me. 262.

different thing from misrepresentation of a precise or definite fact.[1] * Such statements, for instance, as assertions as to the value of property,[2] or representations by the agent of the vendor of land that the title is good,[3] or mere general terms of commendation,[4] or mere general and exaggerated statements as to the profits and prospects of a company,[5] or as to the value of securities,[6] or as to the situation of property,[7] or mere loose, conjectural, or exaggerated assertions with respect to a subject matter, which is a matter of speculation, or is essentially of an uncertain nature,[8] or mere conjectural estimates,[9] † are only expressions of opinion or judgment, as to which honest men may well differ materially. Mere general asser-

[1] Higgins *v.* Samels, 2 J. & H. 464; Ross *v.* Estates Investment Co. L. R. 3 Eq. 136.

[2] Harvey *v.* Young, Yelv. 20; Baily *v.* Merrell, 3 Bulst 94 Cro. Jac. 386; Jendwine *v.* Slade, 2 Esp. 572; Ingram *v.* Thorp, 7 Ha. 74.

[3] Hume *v.* Pocock, L. R. 1 Ch. App. 385.

[4] Fenton *v.* Brown, 14 Ves. 144; Trower *v.* Newcome, 3 Mer. 704; Scott *v.* Hanson, 1 R. & M. 129; White *v.* Cuddon, 8 Cl. & Fin. 766; Dimmock *v.* Hallett, L. R. 2 Ch. App. 26. See Jennings *v.* Broughton, 5 D. M. & G. 126; Johnson *v.* Smart, 2 Giff. 151; Haywood *v.* Cope, 25 Beav. 140; Higgins *v.* Samels, 2 J. & H. 460.

[5] New Brunswick, &c., Railway Co. *v.* Conybeare, 9 H. L. 711; Kisch *v.* Central Venezuela Railway Co. 3 D. J. & S. 122; Denton *v.* Macneil, L. R. 2 Eq. 352.

[6] National Exchange Co. *v.* Drew, 23 Dec. of Ct. of Session, 2d series, p. 1.

[7] Colby *v.* Gadsden, 34 Beav. 416.

[8] Jennings *v.* Broughton, 5 D. M. & G. 136; Stephens *v.* Venables, 31 Beav. 124.

[9] Irvine *v.* Kirkpatrick, 7 Bell, Sc. App. Ca. 186.

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* A fraudulent combination and confederacy, between a lessee and a third person, to induce the lessor to purchase the leasehold through false representations made by such third person, and an assertion of his desire to purchase in case he can obtain the property, is not a simple commendation. Adams *v.* Soule, 33 Vt. 538.

† A gross misrepresentation, as to the boundaries of land, is fraudulent. Griggs *v.* Woodruff, 14 Ala. 9; Elliott *v.* Boaly, 9 Ala. 772; Fisher *v.* Probart, 5 Hey. 75; Camp *v.* Camp, 2 Ala. 632.

To ascertain the quantity of land requires greater skill and a larger proportion of science than is acquired by the majority of men, and a misrepresentation in that respect is material. Pringle *v.* Samuel 1 Litt. 43.

The estimates of quantities, in themselves uncertain and unmeasured, may differ at different times from various circumstances, without any suspicion of willful misrepresentation. Stebbins *v.* Eddy, 4 Mason, 414.

tions of a vendor of property as to its value, or the price he has been offered for it, or in regard to its qualities and characteristics; as, for instance, that land is fertile and improvable, or that soil is adapted for a particular mode of culture, or is well watered, or is capable of producing crops, or supporting cattle, or that a house is a desirable residence, &c., are assumed to be so commonly made by persons having property for sale, that a purchaser cannot safely place confidence in them. Affirmations of the sort are always understood as affording to a purchaser no ground for neglecting to examine for himself, and ascertain the real condition of the property. They are, strictly speaking, *gratis dicta*. A man who relies on such affirmations, made by a person whose interest might so readily prompt him to invest the property with exaggerated value, does so at his peril, and must take the consequences of his own imprudence; *emptor emit quam minimo potest; venditor vendit quam maximo potest.*[1] * Although such affirmations may be erroneous or false, they will not, except in extreme cases, be regarded as evidence of a fraudulent intent.[2] A statement of value may, however, be so plainly false, as to make it impossible for the party to have believed what he stated.[3]† So, also, statements with respect to the quality or condition of land, will, if erroneous or false, amount in extreme cases, to a misrepresentation in law.[4] So, also, a state-

[1] 1 Roll. Ab. 101, pl. 16; Leakins *v.* Clissell, 1 Sid. 146, 1 Lev. 102; Harvey *v.* Young, Yelv. 20; Trower *v.* Newcome, 3 Mer. 704; Scott *v.* Hanson, 1 R. & M. 129; Medbury *v.* Watson, 6 Mete. (Amer.) 259; Gordon *v.* Parmelee, 2 Allen (Amer.), 214; Manning *v.* Albee, 11 *ib.* 522.

[2] *Ib.*; Dimmock *v.* Hallett, L. R. 2 Ch. App. 26.

[3] Wall *v.* Stubbs, 1 Madd. 80; Ingram *v* Thorp, 7 Ha. 74.

[4] Dimmock *v.* Hallett, L. R. 2 Ch. App. 26; Van Epps *v.* Harrison, 5 Hill (Amer.), 67.

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* Anderson *v.* Hall, 2 Smed. & Mar. 679; Evans *v.* Bolling, 5 Ala. 550; Halls *v.* Thompson 1 Smed. & Mar. 443.

† Broddus *v.* McCall, 3 Call. 546; Peyton *v.* Butler, 3 Hey. 141; Pitts *v.* Cottingham 9 Port. 675.

ment in the prospectus of a company, that the promoters of the company had taken "a large portion" of the shares, though vague in its nature, will amount, in extreme cases, to a misrepresentation.[1]

An assertion that a third person has offered a specified sum for the property, though false, is, like mere statements of value, an assertion of so vague and loose a character, that a purchaser is not justified in relying on it.[2]

The difference between a false averment in matter of fact, and a like falsehood in matter of judgment, opinion, and estimate, is well illustrated by familiar cases in the books. If the owner of an estate affirm that it will let or sell for a given sum, when, in fact, such sum cannot be obtained for it, it is, in its own nature, a matter of judgment and estimate, and so the parties must have considered it.[3] * But if an owner falsely affirm that an estate is let for a certain sum, when it is, in fact, let for a smaller sum, or that the profits of a business are more than, in fact, they are, and thereby induces a purchaser to give a higher price for the property, it is fraud, because the matter lies within the private knowledge of the owner.[4] If, again,

[1] Henderson *v.* Lacon, L. R. 5 Eq. 257.

[2] Sug. V. & P. 3, 1 Roll. Ab. 101, pl. 16.

[3] Harvey *v.* Young, Yelv. 20, 1 Roll. Ab, 801, pl. 16; Leakins *v.* Clissell, 1 Sid. 146; comp. Dimmock *v.* Hallett, L. R. 2 Ch. App. 28.

[4] Ekins *v.* Tresham, 1 Lev. 102; Lysney *v.* Selby, 2 Lord Raym. 1118; Dobell *v.* Stevens. 3 B. & C. 623; Hutchinson *v.* Morley, 7 Scott, 341; Dimmock *v.* Hallett, L. R. 2 Ch. App. 28; Medbury *v.* Watson, 6 Metc. (Amer.) 259.

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* If a person sells a tract of land, claiming to be the owner, and knowing that he is not so, he is guilty of fraud. But if he professes to sell, not the paramount title, but a claim derived from a particular source, he is not guilty of a fraud, merely, because he expresses an opinion as to the legal value or strength of his claim, which the facts do not justify, so long as he makes no false statement as to what those facts are. Drake *v.* Latham, 50 Ill. 270.

A false representation that land will yield a certain amount of saltpetre, is fraudulent. Perkins *v.* Rice, 6 Litt. 218.

the owner of land represent that it is well watered, the statement will not, although erroneous or false, amount in law to a misrepresentation, except in extreme cases;[1] but, if he represents that land is situated on the banks of a river, whereas it is some miles off from the river, there is misrepresentation, for the false representation is in respect to a precise and definite fact.[2] So, also, is there misrepresentation of a fact, if the representation be calculated to lead the person to whom it is made to believe that there is a natural supply of water on the property, whereas the fact is that the property, though well supplied with water, derives its supply artificially from the waterworks of a town, and by payment of rates.[3]*

The representation of an actual state of things as existing, is equivalent to the misrepresentation of a fact.[4]

In Vernon *v.* Keyes,[5] the true rule was stated to be that the seller was liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold in some particulars which the buyer has not equal means of knowledge with himself; or if he do so in such a manner as to induce the buyer to forbear making the inquiries which, for his own security and advantage, he would otherwise have made.

The rule that exaggeration, as distinguished from misrepresentation, goes for nothing, applies with peculiar force to the case of statements in the prospectuses of companies. The promoters of adventures are so prone to form sanguine expectations as to the prospects of the schemes which they introduce to the public, that some high coloring and some exaggeration

[1] Scott *v.* Hanson, 1 R. & M. 129; Trower *v.* Newcome, 3 Mer. 704.

[2] Van Epps *v.* Harrison, 5 Hill (Amer.), 67.

[3] Leyland *v.* Illingworth, 2 D. F. & J. 253.

[4] Piggott *v.* Stratton, John. 359; 1 D. F. & J. 49.

[5] 12 East, 632.

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* Pitts *v.* Cottingham, 9 Port. 675; Lewis *v.* McLemon, 10 Yerg. 205; Monell *v.* Colden, 13 Johns. 395.

in the description of the advantages which are likely to be enjoyed by the subscribers to the undertaking, may generally be expected in such documents. No prudent man can, owing to the well-known prevalence of exaggeration in such documents, accept the prospects which are held out by the originators of every new scheme, without considerable abatement. But, though the representations in the prospectus of a company ought not, perhaps, to be tried by as strict a test as is applied in other cases, they are required to be fair, honest, and *bonâ fide*. There must be no misstatement of any material facts or circumstances.[1]

As, on the one hand, mere assertions of value by the vendor of property are not fraudulent in law, though erroneous or false; so, on the other hand, a disparagement of property by a purchaser is not a fraud.[2] Nor is a buyer liable for misrepresenting a seller's chance of sale or probability of his getting a better price. It is a false representation in a matter merely *gratis dictum* by the bidder, in respect of which he is under no legal duty to the seller for the correctness of his statement, and upon which the seller would be incautious to rely.[3] So, also, is a representation by a purchaser to a seller, that his partners would not consent to his giving more than a certain sum, though false, merely a *gratis dictum*.[4] But though the value of property is generally a matter of opinion, a vendor may put upon a purchaser the responsibility of informing him correctly as to the market value, or any other fact known to him, affecting the value of property, and if the purchaser answers untruly, there is fraud. He is not bound to answer in such cases, but if he does he is bound to speak the truth.[5]

[1] Kisch *v.* Central Railway Co. of Venezuela, 3 D. J. & S. 122; Denton *v.* Macneil, L. R. 2 Eq. 352; Central Railway Co. of Venezuela *v.* Kisch, L. R. 2 App Ca. 113.

[2] Tate *v.* Williamson, L. R. 2 Ch. App. 65.

[3] Vernon *v.* Keys, 12 East, 637.

[4] *Ib.*

[5] Smith *v.* Countryman, 3 Tiff. (Amer.) 683, *per* Miller, J.

The representations of a vendor of real estate to the vendee, as to the price which he has paid for it, are, in respect of the reliance to be placed on them, to be regarded generally in the same light as representations respecting its value, or the offers which have been made for it. A purchaser is not justified in placing confidence on them.[1] But a false affirmation by a vendor as to the actual cost of property,[2]* or as to the amount spent upon it by him in improvements,[3] may amount to a fraudulent misrepresentation.

A vendor is not bound to disclose to the vendee the true ownership of the property he is engaged in selling, but he is bound to abstain from making any misrepresentations respecting the ownership.[4]

As distinguished from the false representation of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law,[5] nor does it afford a ground for relief in equity.[6] Where a man was induced to grant a lease of certain premises to another, upon a representation that he intended to use the premises for a stated purpose, whereas he intended to use and did use them for a different and illegal purpose, it was held that the misrepresentation did not entitle the lessor to have the lease avoided.[7] So, also, where a man who had given a bond to another, upon which judgment had been entered up, had married upon the declaration of the

[1] Medbury *v.* Watson, 6 Metc. (Amer.) 259; Hemmer *v.* Cooper, 8 Allen (Amer.), 334.

[2] Sandford, *v.* Handy, 23 Wend. (Amer.) 269; Van Epps *v.* Harrison, 5 Hill (Amer.), 67.

[3] Ross *v.* Estates Investment Co., L. R. 3 Eq. 136.

[4] Hill *v.* Gray, 1 Stark, 434; Maturin *v.* Tredennick, 2 N. R. 514; but comp. Fellowes *v.* Lord Gwydyr, 1 R. & M 83; Nelthorpe *v.* Holgate, 1 Coll. 203.

[5] Vernon *v.* Keys, 12 East, 637; Hemmingway *v.* Hamilton, 4 M. & W. 122; Feret *v.* Hill, 15 C. B. 225.

[6] Jorden *v.* Money, 5 H. L. 185; Bold *v.* Hutchinson, 5 D. M. & G. 558; Kay *v.* Crook, 3 Sm. & G. 407.

[7] Feret *v.* Hill, 15 C. B. 207.

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* Sandford *v.* Handy, 23 Wend. 260; Pendergast *v.* Reed, 29 Md. 398.

person who held the bond and warrant of attorney, that she had abandoned the claim, and would never trouble him about it, the court would not restrain her from enforcing at law the judgment on the warrant of attorney. Lord St. Leonards, however, dissented from the opinion of the majority of the court, holding it to be immaterial in equity, whether the misrepresentation be of a fact or an intention.[1] But if the representation, though in form a representation as to a matter of intention, amounts in effect to a representation as to a matter of fact, relief may be had in equity. Where, accordingly, a lessor, pending an agreement for a building lease, represented to the intended lessee, that he could not obstruct the sea view from the houses to be built by the lessee, because he himself was a lessee under a lease for 999 years, containing covenants which restricted him from so doing; but after the building lease had been taken, and the houses built upon the faith of the representation the lessor surrendered his 999 years' lease, and took a new lease omitting the restrictive years, the court, considering the representation to have been in effect a representation as to a matter of fact, restrained the lessor by injunction from building so as to obstruct the sea view.[2]

A representation which amounts to a mere expression of intention must be distinguished from a representation which amounts to an engagement. If a representation amounts to an engagement, the party making it is bound in equity to make it good.[3] Where, for instance, a man previously to the marriage of his daughter said he intended to leave her 10,000*l.* which was to be settled in a particular way, and that the person about to marry her was for this reason to settle 5,000*l.* on her, and

[1] Jorden *v.* Money, 5 H. L. 185. See Cross *v.* Sprigge, 6 Ha. 553; Maunsell *v.* Hedges, 4 H. L. 1039; comp. Yeomans *v.* Williams, L. R. 1 Eq. 185.

[2] Piggott *v.* Stratton, John. 359, 1 D. F. & J. 49.

[3] Hammersley *v.* De Biel, 12 Cl. & Fin. 45; Maunsell *v.* Hedges, 4 H. L. 1056; Loxley *v.* Heath, 1 D. F. & J. 492; Loffus *v.* Maw, 3 Giff. 592.

the party did make the settlement and married the lady, the engagement was held binding, for the circumstances amounted to a contract.[1] If, on the other hand, a man previously to the marriage of a relation tells him that he has made his will and left him his property, and that he is confident he never would alter his will to his disadvantage, or tells him before his marriage to his daughter that he would leave her so much money, this is a mere expression of intention, on which the person to whom it is addressed is not justified in relying.[2] A representation which amounts to an engagement is enforced not as being a representation of an intention, but as amounting to a contract.[3] There is no middle term, no *tertium quid*, between a representation so made to be effective for such a purpose and being effective for it and a contract.[4]

A misrepresentation of a matter of law does not constitute fraud at law, because the law is presumed to be equally within the knowledge of all the parties. Thus, the misrepresentation of the legal effects of a written agreement which a party signs with a full knowledge of its contents, is not a sufficient ground at law for avoiding the agreement.[5]* But if a man dealing with another misleads him, and takes advantage of his ignorance respecting his legal position and rights, though there may

[1] Hammersley *v.* De Biel, 12 Cl. & Fin. 45. See Barkworth *v.* Young, 4 Drew. 1; Prole *v.* Soady, 2 Giff. 20; Loffus *v.* Maw, 3 Giff. 592; Alt *v.* Alt, 4 Giff. 84.

[2] Bold *v.* Hutchinson, 5 D. M. & G. 558; Maunsell *v.* Hedges, 4 H. L. 1039; Loxley *v.* Heath, 1 D. F. & J. 492; Laver *v.* Gilder, 32 Beav. 4.

[3] Bold *v.* Hutchinson, 5 D. M. & G. 558; Maunsell *v.* Hedges, 4 H. L. 1056; Loxley *v.* Heath, 1 D. F. & J. 492.

[4] 4 H. L. 1056, *per* Lord Cranworth.

[5] Lewis *v.* Jones, 4 B. & C. 506. See Blackburn's Case, 8 D. M. & G. 177; Rashdall *v.* Ford, L. R. 2 Eq. 750.

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* Russell *v.* Branham, 8 Blackf. 277; Starr *v.* Bennett, 5 Hill, 303; Martin *v.* Wharton, 38 Ala. 637; Fish *v.* Cleland, 33 Ill. 238; Jasper *v.* Hamilton, 3 Dana, 280; Goode *v.* Hawkins, 2 Dev. Ch. 393; Clem *v.* New & Dan. R. R. Co., 9 Ind. 488.

be no legal fraud, the case may come within the jurisdiction exercised by courts of equity to prevent imposition.[1] *

To constitute a fraudulent representation, the representation need not be made in terms expressly stating the existence of some fact which does not exist. If a statement be made by a man in such terms as would naturally lead the person to whom it was made to suppose the existence of a certain state of facts, and if such statement be so made designedly and fraudulently, it is as much a fraudulent misrepresentation as if the statement of an untrue fact were made in express terms.[2]

A representation may be false by reason not only of positive misstatements contained in it, but by reason of intentional suppression whereby the information it gives assumes a false color, giving a false impression, and leading necessarily, or almost necessarily, to erroneous conclusion.[3] *Fallit et qui obscure loquitur et qui dissimulat insidiose vel obscure.*[4] *Dolum malum a se abesse praestare venditor debet: qui non tantum in eo est qui fallendi causa obscure loquitur; sed etiam qui insidiose, obscure dissimulat.*[5] It is the duty of a vendor of property to make himself acquainted with all the peculiarities and incidents of the property which he is going to sell, and when he describes the property for the information of a purchaser, it is his duty to describe everything which it is material for him to know, in order to judge of the nature and value of the property. It is not for him just to tell what is not actually

[1] *Infra*—MISTAKE.

[2] Lee *v.* Jones, 17 C. B. N. S 510, *per* Crompton, J.; Lowndes *v.* Lane, 2 Cox, 363; Walker *v.* Symonds, 3 Sw. 73; Drysdale *v.* Mace, 5 D. M. & G. 103; Flint *v.* Woodin, 9 Ha. 621; comp. Bold *v.* Hutchinson, 5 D. M. & G. 558.

[3] Cullen's Trustee *v.* Johnston, 3 Dec. of Court of Session, 3d series, p. 936.

[4] Dig. Lib. 18, tit. 1, leg. 43.

[5] *Ib.*

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* Townsend *v.* Coales, 31 Ala. 428; Drew *v.* Clarke, Cooke, 374; Broadwell *v.* Broadwell, 1 Gilman, 595.

A misrepresentation as to the legal effect of an instrument may be fraudulent. Colter *v.* Morgan, 12 B. Mon. 278.

untrue, leaving out a great deal that is true, and leaving it to the purchaser to inquire whether there is any error or omission in the description or not.[1]

There is a misrepresentation, if a statement be so made that the acuteness and industry of the person to whom it is made is set to sleep, and he is induced to believe the contrary of what is the real state of the case.[2] If, for instance, there is a misrepresentation as to the terms of a particular covenant, which turned out to be of a much more stringent description, there is fraud.[3] So also where conditions of sale are so obscurely worded that when taken in connection with the particulars of sale they are likely to mislead an ordinary purchaser as to the nature of the property, there is fraud.[4] A representation though true to the letter, may be in substance a misrepresentation.[5] There is a misrepresentation, if a statement is calculated to mislead or throw the person to whom it is made off his guard, though it may be literally true.[6] An assertion, on the other hand, by a man of what he thinks entitled in point of law to assert is not a misrepresentation, though it may not be strictly correct.[7]

A misrepresentation is usually by words; but it may be as well by acts or deeds, as by words; by artifices to mislead as well as by actual assertions. Even in chaffering about goods there may be such misrepresentation as to avoid a contract. A man, who by act or deed falsely and fraudulently impresses the

[1] Brandling *v.* Plummer, 2 Drew. 430.

[2] Pope *v.* Garland, 4 Y. & C. 401; Spunner *v.* Walsh, 10 Ir. Eq. 386.

[3] Flight *v.* Booth, 1 Bing. N. C. 377; Van *v.* Corpe, 3 M. & C. 269; Flight *v.* Barton, *ib.* 282.

[4] Taylor *v.* Martindale, 1 Y. & C. C. 658.

[5] Lowndes *v.* Lane, 2 Cox, 363; Flint *v.* Woodin, 9 Ha. 618; Stanton *v.* Tattersall, 1 Sm. & G. 529; M'Culloch *v.* Gregory, 1 K. & J. 286; Clarke *v.* Dickson, 6 C. B. N. S. 453; Ross *v.* Estates Investment Co., L. R. 3 Eq. 135. See Hobbs *v.* Norton, 1 Verm. 135; Crofts *v.* Middleton, 2 K. & J. 210.

[6] Edwards *v.* Wickwar, L. R. 1 Eq. 68; Dimmock *v.* Hallett, L. R. 2 Ch. App. 28; Ross *v.* Estates Investment Co., L. R. 3 Eq. 135; Colby *v.* Gadsden, 15 W. R. 1185; Chester *v.* Spargo, 16 W. R. 576.

[7] Legge *v.* Croker, 1 Ba. & Be. 506; New Brunswick, &c. Railway Co. *v.* Conybeare, 9 H. L. 711. See Wilde *v.* Gibson, 1 H. L. 626.

mind of another with a certain belief whereby he is misled to his injury, is as much guilty of a misrepresentation as if he had deliberately asserted a falsehood.[1]* It is a fraud to impress upon a vendible article the trade-mark of another in order to give it greater currency in the market.[2]

It is not enough that there has been a misrepresentation, and that the misrepresentation has conduced in some way to the transaction in question. It is necessary that the misrepresentation should have been made in relation to the transaction in question, and with the direct intent to induce the party to whom it is immediately made, or a third party, to act in the way that occasions the injury.[3] A representation which has been made some time before the date of the transaction in question is not sufficient, unless it can be clearly shown to have been immediately connected with it.[4] A representation to be of any avail whatever, must, unless under special circumstances, have been made at the time of the treaty,[5] and should not have any relation to any collateral matter or other relation or dealing between the parties.[6]

[1] Sibbald *v.* Hill, 2 Dow. 266; Lovell *v.* Hicks, 2 Y. & C. 55; Crawshay *v.* Thornton, 4 M. & G. 387; Barnes *v.* Pennell, 2 H. L. 497.

[2] Crawshay *v.* Thornton, 4 M. & G. 387. See Kerr on Injunctions, p. 474.

[3] East India Co. *v.* Henchman, 1 Ves. J. 287; Dobell *v.* Stevens, 3 B. & C. 623; Harris *v.* Kemble, 5 Bligh, N. S. 730; Attwood *v.* Small, 6 Cl. & Fin. 232, 445; Irvine *v.* Kirkpatrick, 7 Bell's Sc. Ap. Ca. 186; Barnes *v.* Pennell, 2 H. L. 497, 529; Smith *v.* Kay, 7 H. L. 750, 775; National Exchange Co. *v.* Drew, 2 Macq. 120; Nicoll's Case, 3 D. & J. 387, 440; Jameson *v.* Stein, 21 Beav. 5; Denne *v.* Light, 8 D. M. & G. 774; Barry *v.* Crosskey, 2 J. & H. 1; Way *v.* Hearne, 32 L. J. C. P. 34; Queen *v.* Sadlers' Co., 10 H. L. 404.

[4] Barnes *v.* Pennell, 2 H. L. 497, 530. See Nicoll's Case, 3 D. & J. 439; Wheelton *v.* Hardisty, 8 E. & B. 232; Maunsell *v.* Hedges, 4 H. L. 1060, *per* Lord St. Leonards; Barrett's Case, 3 D. J. & S. 30; Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. Ca. 155.

[5] Harris *v* Kemble, 1 Sim. 122, *per* Sir J. Leach. M. R. See Wheelton *v.* Hardisty, El. Bl. & El. 232; Hotsom *v.* Browne, 9 C. B. N. S. 445; Smith *v.* Kay, 7 H. L. 750.

[6] Harris *v.* Kemble, 1 Sim. 122, 5 Bligh's N S. 730; National Exchange Co. *v.* Drew, 2 Macq. 103.

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* Martin *v.* Pennock, 2 Barr. 376; Graves *v.* White, 1 Freem. 57; Chisholm *v.* Gadsden, 1 Strobh. 220; Smith *v.* Mitchell, 6 Geo. 458; Reese *v.* Wyman, 9 Geo. 430; Cochran *v.* Cummings, 4 Dall. 250; Willink *v.* Vanderwear, 1 Barb. 599.

Misrepresentation, however, goes for nothing either at law or in equity unless a man has been misled thereby to his prejudice.* Fraud without damage is not sufficient to support an action or to be a ground for relief in equity.[1] But it is enough if the representation operates to the prejudice of a man to a very small extent.[2] Fraud gives a cause of action if it leads to any sort of damage.[3] But in order that a false representation should give a cause of action the damage must be the immediate and not the remote cause of the representation.[4]

Misrepresentation may consist as well in the concealment of what is true as in the assertion of what is false.[5] If a man conceals a fact that is material to the transaction, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if the existence of such fact were expressly denied or the reverse of it expressly stated.[6]† Concealment to be of any avail whatever, either at law or in equity, must be *dolus dans locum contractui*. There must be the sup-

[1] Polhill *v.* Walter, 3 B. & Ad. 114; Fellowes *v.* Lord Gwydyr, 1 Sim. 63, 1 R. & M. 83. See Flint *v.* Woodin, 9 Ha. 618; Smith *v.* Kay, 7 H. L. 750.

[2] Cadman *v.* Horner, 18 Ves. 10. See Ross *v.* Estates Investment Co., L. R. 3 Eq. 136.

[3] Smith *v.* Kay, 7 H. L. 750, 775.

[4] Barry *v.* Crosskey, 2 J. & H. 1.

[5] Tapp *v.* Lee, 3 B. & P. 371; Central Railway Co. of Venezuela *v.* Kisch, L. R. 2 App. Ca. 114; Oakes *v.* Turquand, *ib.* 326.

[6] Conyers *v.* Ennis, 2 Mass. (Amer.) 236.

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* Farrar *v.* Alston, 1 Dev. 69; Ide *v.* Gray, 11 Vt. 615; Young *v.* Bumpass, 1 Freem. Ch. 241; Clark *v.* White, 12 Pet. 178; Garrow *v.* Davis, 15 How. 272; Abbey *v.* Dewey, 25 Penn. 413; Morgan *v.* Bliss, 2 Mass. 112; Fuller *v.* Hogden, 25 Me. 243.

The true measure of damages is the difference between the actual value of the property and the value which it would have possessed if it had been as represented. Rawley *v.* Woodruff, 2 Lans. 419.

If a man is procured to do an act even through fraud, yet the act will be valid if it was such as the law would have compelled him to perform. Young *v.* Bumpass, 1 Freem. Ch. 241.

† Rawdon *v.* Blatchford, 1 Sandf. Ch. 344; Trigg *v.* Read, 5 Humph. 529; Scott *v.* Bamer, 2 Lans. 567; Smith *v.* Click, 4 Humph. 186; Prentiss *v.* Russ, 16 Me. 30.

pression of a fact, the knowledge of which it is reasonable to infer would have made the other party to the transaction abstain from it altogether. Concealment of a fact is not material if the statement of that fact would not have induced a man (otherwise desirous of entering into the transaction) to abstain from it[1] A concealment to be material must be the concealment of something that the party concealing was under some legal or equitable obligation to disclose.[2] *

If the fact is one which ought to have been disclosed, the circumstance that it may not have been disclosed through mistake, ignorance, or forgetfulness, cannot be taken into consideration. It is immaterial that the concealment may not have been wilful or intentional, or with a view to private advantage.[3] † It is also essential that the concealment should be

[1] Pulsford *v.* Richards, 17 Beav. 98. See Davies *v.* Cooper, 5 M. & C. 270; Bainbrigge *v.* Moss, 3 Jur. N. S. 58; Vane *v.* Cobbold, 1 Exch. 798; New Brunswick, &c. Railway Co. *v.* Muggeridge, 1 Dr. & Sm. 363; Kisch *v.* Central Venezuela Railway Co., 3 D. J. & S. 122.

[2] Irvine *v.* Kirkpatrick, 7 Bell, Sc. Ap. 186; Horsfall *v.* Thomas, 1 H. & C. 100, *per* Bramwell, B.; Archbold *v.* Lord Howth, L. R. Ir. 2 C. L. 629. See Dalbiac *v.* Dalbiac, 16 Ves. 124; Dalby *v.* Pullen, 1 R. & M. 296; Adamson *v.* Evitt, 2 R. & M. 72; Harris *v.* Kemble, 1 Sim. 111, 5 Bligh, 730; Groves *v.* Perkins, 6 Sim. 576; Clarke *v.* Tipping, 9 Beav. 284; Stikeman *v.* Dawson, 1 Deg. & S. 90; Shackleton *v.* Sutcliffe, *ib.* 609; Roddy *v.* Williams, 3 J. & L. 21; Abbott *v.* Sworder, 4 Deg. & S. 448; Pulsford *v.* Richards, 17 Beav. 87; Maclure *v.* Ripley, 2 Mac. & G. 274; Blake *v.* Mowatt, 21 Beav. 603; Beck *v.* Kantorowicz, 3 K. & J. 247; Vane *v.* Cobbold, 1 Exch. 798; Haywood *v.* Cope, 25 Beav. 140; Brumfit *v.* Morton, 3 Jur. N. S. 1198; Evans *v.* Carrington, 1 J. & H. 598, 2 D. F. & J. 481; New Brunswick, &c. Railway Co. *v.* Muggeridge, 1 Dr. & Sm. 363; Greenfield *v.* Edwards, 2 D. J. & S. 582, 598; Central Venezuela Railway Co. *v.* Kisch, L. R. 2 App. Ca. 112; Re Madrid Bank, L. R. 2 Eq. 216; Hallows *v.* Fernie, L. R. 3 Eq. 536; Kent *v.* Freehold Land and Brickmaking Co., L. R. 4 Eq. 598.

[3] Pusey *v.* Desbouverie, 3 P. Wms.

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* Pearrett *v.* Shawbhut, 5 Miss. 323; Jouzin *v.* Toulmin, 9 Ala. 662; Steele *v.* Kinkle, 3 Ala. 352.

Concealment which amounts to fraud in the sense of a court of equity, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate, and which the other party has a right not merely *in foro conscientiæ*, but *juris et de jure*, to know. Young *v.* Bumpass, 1 Freem. Ch. 241.

† Farnam *v.* Brooks, 9 Pick. 212; Davidson *v.* Moss, 4 How. (Miss.) 673; Smolson & Co. *v.* Franklin, 6 Munf. 210.

in reference to the particular transaction,[1] and should inure to the date of it. If a party to a transaction conceals, however fraudulently, a material fact from another with whom he is treating, but that other, notwithstanding the concealment, gets at the fact concealed before he enters into the transaction, the concealment goes for nothing. It is of no avail, if the party has become in any way acquainted with the truth.[2]* *Scientia utrinque par pares contrahentes facit.* The law will not interpose, where both parties to the transaction are equally well informed or are in equal ignorance as to the actual condition or value of the subject-matter of the transaction.[3]†

The principles of morals require more scrupulous good faith in the dealings of men with each other than is exacted either at law or in equity. The writers of the moral law hold it to be the duty of the seller to disclose the defects which are within his knowledge.[4] But the common law is not so strict. The law aims at practical good and general convenience rather than at theoretical perfection. It does not profess to vindicate every deflection from propriety, but requires men in their dealings with each other to exercise proper vigilance and apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment, and not to close their eyes to the means of information

315; Bowles *v.* Stuart, 1 Sch. & Lef. 249; Brydges *v.* Braufil, 12 Sim. 384; Willis *v.* Willis, 17 Sim. 218; Railton *v.* Matthews, 10 Cl & Fin. 934.

[1] Green *v.* Gosden, 3 M. & G. 446.

[2] Irvine *v.* Kirkpatrick, 7 Bell, Sc. Ap. 186, 237.

[3] Sug. V. & P. 1; Knight *v.* Marjoribanks, 11 Beav. 348, 2 H. & Tw. 316.

[4] Grot. b. 2, c. 12, s. 9.

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* Clark *v.* White, 12 Pet. 178; Phettiplace *v.* Sayles, 4 Mason, 312; Pratt *v.* Philbrook, 33 Me. 17.

† Hobbs *v.* Parker, 31 Me. 143; Dooley *v.* Jinning, 6 Mo. 61; Perkins *v.* McGavock, Cooke, 415.

There is no fraudulent concealment where a party entertains suspicions merely, but does not possess actual knowledge. Crawford *v.* Bertholf, Saxton, 458.

which are accessible to them: *vigilantibus, non dormientibus, jura subveniunt.* If parties are at arms' length, either of them may remain silent and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both, or equally within the reach of their ordinary diligence, and is under no obligation either at law or in equity to draw the attention of the other to circumstances affecting the value of the property in question, although he may know him to be ignorant of them. If, for example, a man treats for the purchase of an estate, knowing that there is a mine under the land, and the other party makes no inquiry, the former is not bound to inform him of the fact.[1]* So also a first mortgagee with power of sale, who has made an advantageous contract for the sale of the mortgaged premises, may buy up the interest of a second mortgagee who supposed the property was insufficient to pay off both mortgages, without informing him of the contract.[2]

[1] Fox *v.* Macreth, 2 Bro. C. C. 420; Turner *v.* Harvey, Jac. 169, 178; Stikeman *v.* Dawson, 1 Deg. & S. 90; Laidlaw *v.* Organ, 2 Wheat. (Amer.) 178; Wilde *v.* Gibson, 1 H. L. 605; Walters *v.* Morgan, 3 D. F. & J. 723; Archbold *v.* Lord Howth, Ir. L. R. 2 C. L. 608; Sug. V. & P. 14th ed. 2, 328, 335.

[2] Dolman *v.* Nokes, 22 Beav. 402.

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* Smith *v.* Beatty, 2 Ired Eq. 456. Livingston *v.* Peru Iron Co. 2 Paige, 390; Perkins *v.* McGavock, Cooke, 415; Harris *v.* Tyson, 24 Penn. 347; Butler's Appeal, 26 Penn 63.

A purchaser is not bound to communicate information concerning extrinsic circumstances which might influence the price of a commodity where the means of intelligence are equally accessible to both parties. But, at the same time, each party must take care not to say or do anything tending to impose upon the other. Laidlaw *v.* Organ, 2 Wheat. 178; Matthews *v.* Bliss, 22 Pick. 48; Kintzing *v.* McElrath, 5 Barr, 467; Merriweather *v.* Herran, 8 B. Mon. 162; Bowman *v.* Bates, 2 Bibb, 47; *contra*, Frazier *v.* Gervais, Walker, 72.

The tenants in common of a vessel, who are not engaged jointly in the employment of purchasing or building ships for sale, do not stand in such a relation of mutual trust and confidence to each other in respect of the sale of such vessel, that each is bound to communicate all the information of facts within his knowledge, which may affect the price. Matthews *v.* Bliss, 22 Pick. 48.

A very little, however, is sufficient to affect the application of the principle. If a single word be dropped by a purchaser which tends to mislead the vendor, the principle will not be allowed to operate.[1] "A single word," said Lord Campbell, in Walters *v.* Morgan,[2] "or even a nod, or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact which might influence the price of the subject to be sold, is a fraud at law. So *à fortiori* would a contrivance on the part of the purchaser better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of its real value, or time to deliberate and take advice respecting the conditions of the bargain." If a purchaser conceal the fact of the death or dangerous illness of a person of which the seller is ignorant, and by which the value of the property is materially increased, there is fraud.[3]

A vendor may not, on the other hand, use any art or practise any artifice to conceal defects, or make any representation for the purpose of throwing the buyer off his guard. If he says or does anything whatever with an intention to divert the eye or obscure the observation of the buyer even in relation to open defects, there is fraud.[4]* As, for example, where a man having a log of mahogany to sell, turned it over so as to conceal a hole in the underneath side.[5] So also where a man sold

[1] Turner *v.* Harvey, Jac. 169, 178; Dolman *v.* Nokes, 22 Beav. 402. See Davies *v.* Cooper, 5 M. & C. 270; Blake *v.* Mowatt, 21 Beav. 603; Cannock *v.* Jauncey, 27 L. J. Ch. 57.

[2] 3 D. F. & J. 724.

[3] Turner *v.* Harvey, Jac. 169; Ellard *v.* Llandaff, 1 Ba. & Be. 241; Jones *v.* Keene, 2 Moo. & Rob. 349. See Popham *v.* Brooke, 5 Russ. 9.

[4] Hill *v.* Gray, 1 Stark. 434; Pillmore *v.* Hood, 5 Bing. N. C. 97; Dobell *v.* Stevens, 3 B. & C. 623; Edwards *v.* Wickwar, L. R. 1 Eq. 68.

[5] Udell *v.* Atherton, 7 H. & N. 172.

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* Hough *v.* Richardson, 3 Story, 690; Doggett *v.* Emerson, 3 Story, 732; Daniel *v.* Mitchell, 1 Story, 172.

a vessel "with all faults," and, before the sale, took her from the ways on which she lay and kept her afloat in a dock in order to prevent an examination of her bottom, which he knew to be unsound, the purchaser was held entitled to avoid the sale on account of fraud.[1]

So also if a vendor were to describe the property as let upon lease under certain specified covenants, beneficial to the reversion, which however he knew could not be enforced, this would probably be considered delusive.[2] So also if a vendor knowing of an incumbrance on an estate sells without disclosing the fact, and with knowledge that the purchaser is a stranger to it, and under representations inducing him to buy, he acts fraudulently and violates integrity and fair dealing.[3] The same rule applies to the case where a party pays money in ignorance of circumstances with which the receiver is acquainted, and does not disclose, and which, if disclosed, would have prevented the payment. In that case the parties do not deal on equal terms, and the money is held to be unfairly obtained and may be recovered back.[4]

So also, and upon the same principle, there is fraud, if a man wishing to advance an undertaking, in which he was interested, determines to purchase shares in it, and another person, also interested in the undertaking, takes advantage of the knowledge he possesses of the intention of the former to defeat the particular act, whereby he sought to accomplish his object, and to substitute in the place of it a mode of disposing of a portion of his own interest in the undertaking.[5]

Mere reticence does not amount to a legal fraud, however

[1] Baglehole *v.* Walters, 3 Camp. 154; Schneider *v.* Heath, *ib.* 506. See Pickering *v.* Dowson, 4 Taunt. 784; Kain *v.* Old, 2 B. & C. 634; Taylor *v.* Bullen, 5 Exch. 779.

[2] Flint *v.* Woodin, 9 Ha. 621.

[3] 1 Ves. 96, *per* Lord Hardwicke.

[4] Martin *v.* Morgan, 1 Brod. & Bing. 289. See Heane *v.* Rogers, 9 B. & C. 577, *per* Bayley, J.

[5] Blake *v.* Mowatt, 21 Beav. 614

it may be viewed by moralists. Either party may be innocently silent as to ground open to both to exercise their judgment upon. If the parties are at arms' length neither of them is under any obligation to call the attention of the opposite party to facts or circumstances which lie properly within his knowledge, although he may see that they are not actually within his knowledge.[1] But a man may by mere silence, without active concealment, produce a false impression on the mind of another. *Aliud est celare, aliud tacere; neque enim id est celare, quicquid reticeas; sed cum, quod tu scias, id ignorare, emolumenti tui causa, velis eos quorum intersit id scire.*[2] Silence implies assent when there is a duty to speak. *Qui tacet consentire videtur; qui potest et debet vetare, jubet.*[3] If a man by his silence produces a false impression on the mind of another, there is a fraud.[4] In Hill *v.* Gray,[5] where a man bought a picture under a delusion as to the ownership of it, and the agent of the vendor encouraged the delusion and took advantage of it in effecting a sale, Lord Ellenborough held the contract might be avoided on the ground of fraud.[6]

If a man interested is present and hears any false or imperfect representation made, and does not set it right, he is fixed by the representation.[7]

A vendor is by the civil law bound to warrant the thing he sells or conveys, albeit there be no express warranty; but the common law binds him not, unless there be a warranty either in deed or law. *Caveat emptor* is the ordinary rule of the

[1] Archbold *v.* Lord Howth, L. R. Ir. 2 C. L. 608. See Walters *v.* Morgan, 3 D. F. & J. 723.

[2] Cicero de Offic. lib. 3, chap. 12, *per* Lord Mansfield, 3 Burr. 1910, *per* Lord Abinger, 6 M. & W. 381; Nelthorpe *v.* Holgate, 1 Coll. 221, *per* Knight Bruce, L. J.

[3] Morgan *v.* Evans, 3 Cl. & Fin. 205; Burke *v.* Trior, 15 Ir. Ch. 106.

[4] See *infra*.

[5] 1 Stark. 434.

[6] See Keates *v.* Lord Cadogan, 10 C. B. 600.

[7] Shepherd *v.* Sharpe, 4 L. T. 270; Davies *v.* Davies, 6 Jur. N. S. 1322. See Smith *v.* Bank of Scotland, 1 Dow. 272; Warner *v.* Daniels, 1 Wood & Min. (Amer.) 90.

common law.[1]* If the defects in the subject-matter of sale are patent, or such as might and should be discovered by the exercise of ordinary vigilance, and the buyer has an opportunity of inspecting it, the law does not require the seller to aid and assist the observation of the purchaser.† Even a warranty will not cover defects that are plainly the objects of sense.[2] Defects, however, which are latent,[3] or circumstances materially the subject-matter of sale of which the purchaser has no means, or at least has not equal means of obtaining knowledge, must, if known to the seller, be disclosed. Where, for instance, particulars of sale described the subject of sale as a certain interest, if any, the vendor knowing at the time that it was of no value, whereas the purchaser had no means of ascertaining whether it was of any value or not, the transaction was held fraudulent.[4] So also on the sale of a ship, which had a latent defect known to the seller, and which the buyer could not by any attention possibly discover, the seller was held bound to disclose it.[5] So also where a man sold an estate to another knowing or having reason to know at the time, but concealing the fact that part of the land was an encroachment upon a common to which he had no title, the sale was set aside as having been effected by fraud.[6] So also if one of the parties to a transaction knows that the solicitor of the other party has not

[1] Co. Litt. 102 a, Hob. 99, Broom's Leg. Max. 739.
[2] Dyer *v.* Hargrave, 10 Ves. 507; Grant *v.* Munt, Coop. 173; Jennings *v.* Broughton, 5 D. M. & G. 131; Horsfall *v.* Thomas, 1 H. & C. 100.
[3] Mellish *v.* Motteux, Peake, 156.
[4] Smith *v.* Harrison, 26 L. J. Ch. 412.
[5] Mellish *v.* Motteux, Peake, 156.
[6] Edwards *v.* M'Cleay, 2 Sw. 287.

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* Salem India Rubber Co. *v.* Adams, 23 Pick. 256; Wintz *v.* Morrison, 17 Tex. 372; Cecil *v.* Spurger, 32 Mo. 462; Turner *v* Huggins, 14 Ark 21.

† Buck *v.* McCaughtry, 5 Mon. 216; Barnett *v.* Stanton, 2 Ala. 181; McKinney *v.* Fort, 10 Tex. 220; Lawnson *v.* Baer, 7 Jones, 461; Reading *v.* Price, 3 J. J. Marsh. 61; Cardwell *v.* McClelland, 3 Sneed, 150; Barron *v.* Alexander, 27 Mo. 530.

disclosed to him some matter of a material nature, the concealment may be fraudulent.[1] So also if a creditor compounds with his debtor under a false impression in which the debtor knowingly leaves him as to the extent of the debtor's estate, there is a fraud.[2]

A vendor, however, is not bound to state that the property has been recently valued at a sum greatly less than the intended purchaser's money, or that the tenant has complained of the rent as being excessive.[3]

A vendor may, on the sale of chattels, expressly stipulate that the buyer is to take the chattels "with all faults." In such case it is immaterial how many faults there are within his knowledge; but he may not use any artifice to disguise them, or to prevent the buyer from discovering them.[4]* Upon the same principle it would appear that if the defects are of such a nature that they cannot be discovered by any attention whatever on the part of the purchaser, the insertion of the condition will not excuse the vendor from disclosing those within his knowledge.[5]

The maxim *caveat emptor* applies with certain specific restrictions and qualifications, both to the title and quality of the subject-matter of sale. In the case of real estate the vendor must produce to the purchaser all documents of title in his possession or power, and give information of all material facts not apparent thereon.[6] Any charge upon the estate, or

[1] Solomon *v.* Honywood, 12 W. R. 572.
[2] Vine *v.* Mitchell, 1 Mood. & Rob. 337.
[3] Abbott *v.* Sworder, 4 Deg. & S. 448, 460.
[4] Baglehole *v.* Walters, 3 Camp. 154; Schneider *v.* Heath, *ib.* 506, *supra*, p. 98.
[5] Sug. V. & P. 14th ed. p. 333.
[6] Edwards *v.* M'Cleay, Coop. 308; Dart's V. & P. 57.

* These terms put upon the purchaser no risk or hazard but those which are consistent with the property being such as it is described. Smith *v.* Richards, 13 Pet. 26; Pearce *v.* Blackwell, 12 Ired. 49; Terry *v.* Buck, 1 Green's Ch 366.

right restrictive of the purchaser's absolute enjoyment of it, and the release of which cannot be procured by the vendors, should be stated; or the omission may, in many cases, render the sale voidable by the purchaser;[1]* *e. g.* a right of sporting over the estate,[2] a right of common every third year,[3] a right to dig for mines,[4] a liability to repair the church chancel,[5] or any other right or liability which cannot fairly admit of compensation,[6] or would render the estate different in substance from what the purchaser was justified in believing it to be,[7] would, if undisclosed, have that effect.[8]

A vendor need not, however, direct attention to defects, &c., apparent on the title-deeds,[9]† or to any matter of which the purchaser has actual or constructive notice.[10] But if the seller be informed by the purchaser of his object in buying, and the lease contains covenants which defeat that object, mere silence is fraudulent concealment.[11] If there has been no fraudulent concealment on the part of the seller, but the title turns out to be defective, the rule *caveat emptor* applies, and the purchaser has no remedy, unless he take a special covenant or war-

[1] Dart's V. & P. 73.
[2] Burnell *v.* Brown, 1 J. & W. 172.
[3] Gibson *v.* Spurrier, Pea. Ad. c. 50.
[4] Seaman *v.* Vawdrey, 16 Ves. 390.
[5] Forteblow *v.* Shirley, cited 2 Sw. 223.
[6] Dart's V. & P. 74.
[7] *Supra*, pp. 58, 63, 64.
[8] See, further, Dart's V. & P. 74, 75.
[9] Sug. V. & P. 8.
[10] Dart's V. & P. 57, 74.
[11] Flight *v.* Barton, 3 M. & K. 282.

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* Prout *v.* Roberts, 32 Ala. 427; Halbert *v.* Grant, 4 Mon. 580; Ingram *v.* Morgan, 4 Humph. 66; Steele *v.* Kinkle, 3 Ala. 353; Carr *v.* Callaghan, 3 Litt. 216; Kennedy *v.* Johnson, 2 Bibb, 12; Campbell *v.* Whittingham, 5 J. J. Marsh. 96; Pollard *v.* Rogers, 4 Call, 239; Snelson & Co. *v.* Franklin, 6 Munf. 210; Davidson *v.* Moss, 4 How. (Miss.) 673.

If a previous incumbrance is concealed, the fact that it is recorded is immaterial. Napier *v.* Elam, 6 Yerg. 108; Young *v.* Hopkins, 6 Mon. 23; Campbell *v.* Whittingham, 5 J. J. Marsh. 96; Steele *v.* Kinkle, 3 Ala. 352; Kennedy *v.* Johnson, 2 Bibb, 12.

† Ward *v.* Packard, 18 Cal. 391; Alston *v.* Outerbridge, 1 Dev. Ch. 18.

ranty.[1]* A seller selling in good faith, is not responsible for the goodness of the title beyond the extent of his covenants.[2]

There is no implied warranty on a demise of real or leasehold property, that it is fit for the purposes for which it is taken.[3] The purchaser takes the risk of its quality and condition, unless he protects himself by an express agreement on the subject.[4] There is no implied duty cast on the owner of a house in a ruinous and unsafe condition to inform a proposed tenant, that it is unfit for habitation, nor will an action of deceit lie against him for omitting to disclose the fact;[5] but a seller must not, during a treaty for, or while intending a sale, endeavor to conceal a defect, or to divert a purchaser's attention from it.[6]

In the case of a sale of goods and chattels, the rule *caveat emptor* applies to the title, unless the seller knows that he has

[1] Parkinson *v.* Lee, 2 East, 323, *per* Lawrence, J.; Stephens *v.* Medina, 4 Q. B. 428, Broom's Leg. Max. 743.

[2] See Bree *v.* Holbech, Dougl. 655.

[3] Sutton *v.* Temple, 12 M. & W. 52; Hart *v.* Windsor, 12 M. & W. 68; Keates *v.* Cadogan, 10 C. B. 591; Chappell *v.* Gregory, 34 Beav. 250; but see Smith *v.* Marrable, 11 M. & W. 6. See Broom's Leg. Max. 744–746.

[4] Izon *v.* Gorton, 5 Bing. N. C. 501; Surplice *v.* Farnsworth, 7 M. & G. 576.

[5] Keates *v.* Cadogan, 10 C. B. 591.

[6] Dart's V. & P. 56.

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* Abbott *v.* Allen, 2 Johns. Ch. 519; Chesterman *v.* Gardner, 5 Johns. Ch. 29; Wallace *v.* Barlow, 3 Bibb, 171; Jasper *v.* Hamilton, 3 Dana, 280; Manney *v.* Porter, 3 Humph. 347; Frost *v.* Raymond, 2 Caines, 188; Williamson *v.* Raney, 1 Freem. 112.

When the vendor knows that the property has no existence, he commits a fraud by selling. Wardell *v.* Fosdick, 13 Johns. 325; Terry *v.* Buck, 1 Green's Ch. 366.

If the vendor knows that he has no title, and conceals that fact, the sale is fraudulent. Clark *v.* Baird, 9 N. Y. 183; Johnson *v.* Pryor, 5 Hey, 243; Beardsley *v.* Bennett, 1 Day, 107.

If the property is known to the vendor to be worthless, he cannot protect himself by telling the vendee to inquire for himself. (Terry *v.* Buck, 1 Green's Ch. 366

A man who buys a defective title knowing it to be so, must abide the consequences. Williamson *v.* Raney, 1 Freem. 112; Allen *v.* Hopson, 1 Freem. 276.

no title and conceals the fact, or unless the surrounding circumstances of the case are such that a warranty may be implied.[1]* In the ordinary case, for instance, of the sale of goods in a shop, there is a warranty of title, for the seller, by the very act of selling, holds himself out to the buyer that he is the owner of the articles he offers for sale.[2] If, however, the surrounding circumstances are such that the seller must be taken to be merely selling such a title as he has himself in the goods, the maxim applies, and there is no warranty of title.[3]

The question as to the application of the maxim *caveat emptor* on the sale of goods in respect to the quality of the goods, was elaborately considered by the Court of Queen's Bench in a very late case.[4] The cases on the subject were distinguished as falling under five different heads:

[1] Marley *v.* Attenborough, 3 Exch. 500; Hall *v.* Conder, 2 C. B. N. S. 40; Eichholtz *v.* Bannister, 17 C. B. N. S. 708.

[2] Eichholtz *v.* Bannister, 17 C. B. N. S. 708.

[3] Marley *v.* Attenborough, 3 Exch. 500; Hall *v.* Conder, 2 C. B. N. S. 22; Chapman *v.* Speller, 14 Q. B. 621; Sims v. Marryatt, 17 Q. B. 291; Bagueley *v.* Hawley, L. R. 2 C. P. 629. See Eichholtz *v.* Bannister, 17 C. B. N. S. 708.

[4] Jones *v.* Just, L. R. 3 Q. B. 197, 202.

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* It is a general and familiar principle that there exists in every sale of personal property an implied warranty of title. Mockbee *v.* Gardner, 2 H. & G. 177; Boyd *v.* Bopst, 2 Dall. 91; Coolidge *v.* Brigham, 1 Met. 551; Lamis *v.* Auld, 7 Murph. 138; Dean *v.* Mason, 4 Ct. 428; Payne *v.* Rodden, 4 Bibb, 304; Hermance *v.* Vernoy, 6 Johns. 8; Case *v.* Hall, 29 Wend. 103; Colcock *v.* Reed, 3 McCord, 513; Dorsey *v.* Jackman, 1 S. & R. 42; Strong *v.* Barnes, 11 Vt. 221; Chandler *v.* Wiggins, 4 B. Mon. 201.

When the vendor is in possession of the property sold, there is an implied warranty of title. Long *v.* Hickingbottom, 28 Miss. 772; Robinson *v.* Rives, 20 Mo. 229; Huntington *v.* Hall, 36 Me. 501; McCoy *v.* Artcher, 3 Barb. 323; Colcock *v.* Reed, 3 McCord, 513; Reed *v.* Barber, 5 Cow. 272; Norton *v.* Hooten, 17 Ind. 365; Sherman *v.* Champlain Trans. Co. 31 Vt. 162; Scranton *v.* Clark, 39 Barb. 273.

This implied warranty extends to a prior lien or incumbrance. Maine *v.* King, 8 Barb. 535.

When the vendor is not in possession of the goods, the purchaser buys at his peril, unless there is an express warranty of title. Edick *v.* Crim. 10 Barb. 445; Lackey *v.* Stouder, 2 Ind. 376; Scott *v.* Hix, 2 Sneed. 192.

"1st. Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect is latent, and not discoverable on examination, at least where the seller is neither the manufacturer nor the grower.[1] The buyer, in such case, has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality, or are merchantable.[2] *

"2ndly. Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty.[3] †

"3rdly. Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described and defined thing be actually supplied, there is no

[1] Parkinson *v.* Lee, 2 East, 314.
[2] Emmerton *v.* Matthews, 7 H. & N. 586, 31 L. J. Exch. 139.
[3] Barr *v.* Gibson, 3 M. & W. 390.

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* Stevens *v.* Smith, 21 Vt. 90; Osgood *v.* Lewis, 2 H. & G. 496; Johnston *v.* Cope, 2 H. & J. 89; Williams *v.* Stoughton, 3 Miss. 347; Kingsbury *v.* Taylor, 29 Me. 508; Scott *v.* Renick, 1 B. Mon. 63; Mixer *v.* Coburn, 11 Met. 559; Richardson *v.* Johnson, 1 La. An. 389.

The exception only applies to those cases where the inspection is impracticable, as where goods are sold before their arrival or landing. The mere fact that inspection is attended with inconvenience or labor, is not equivalent to impracticability. Hyatt *v.* Boyle, 5 G. & J. 110.

In every executory contract for the future sale and delivery of articles of merchandise, the law clearly implies an agreement that the goods shall be of a merchantable value. Hamilton *v.* Ganyard, 34 Barb. 204.

† Williams *v.* Slaughter, 3 Wis. 347; Deming *v.* Foster, 42 N. H. 165; Dickens *v.* Jordan, 11 Ired. 166; Gihon *v.* Levy, 2 Duer, 176; Carson *v.* Bailie, 19 Penn. 375.

warranty that it shall answer the particular purpose intended by the buyer.[1]

"4thly. Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied.[2] * In such a case, the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

"5thly. Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article.[3] So, also, on a sale by a merchant to a merchant or dealer, who has had no opportunity of inspection, there is an implied warranty that the article shall be reasonably fit for the purpose for which it is supplied.[4] In every contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must also be saleable and merchantable under that description."[5]

[1] Chanter *v.* Hopkins, 4 M. & W. 399; Ollivant *v.* Bayley, 5 Q. B. 288.
[2] Brown *v.* Edgington, 2 M. & G. 279; Jones *v.* Wright, 5 Bing. 533.
[3] Laing *v.* Fidgeon, 4 Camp. 169, 6 Taunt. 108; Shepherd *v.* Pybus, 3 M. & G. 868.
[4] Bigge *v.* Parkinson, 7 H. & N. 955; 31 L. J. Exch. 301.
[5] Jones *v.* Just, L. R. 3 Q. B. 197.

* Brenton *v.* Davis, 8 Blackf. 508; Beers *v.* Williams, 16 Ill. 69; Walton *v.* Cody, 1 Wis. 420; Brown *v.* Murphee, 31 Miss. 91; Cunningham *v.* Hull, Sprague, 404; Hoe *v.* Sanborn, 21 N. Y. 552; Rodgers *v.* Niles, 11 Ohio St. R. 48; Page *v.* Ford, 42 Ind. 46; Howard *v.* Hoey, 23 Wend. 350; Miner *v.* Granger, 4 Gilman, 69; Taylor *v.* Sands, 5 Johns. 403; Overton *v.* Phelan, 2 Head, 445; Fisk *v.* Tank, 12 Wis. 276; Pease *v.* Sabin, 38 Vt. 432; Freeman *v.* Clute, 3 Barb. 424; Gallagher *v.* Waring, 9 Wend. 20; Getty *v.* Rountree, 2 Chand. 28.

The rule *caveat emptor* renders it lawful for a man holding shares in an insolvent company to sell them to any one willing to buy them, and in the absence of misrepresentation by the seller, the buyer is apparently without any remedy against him.[1]

The mere omission of a purchaser of property to disclose his insolvency to the vendor, is not a fraud for which the sale may be avoided. If no inquiries are made, and the vendee makes no false statements, nor resorts to any artifice or contrivance for the purpose of misleading the vendor, it is not in general fraudulent in him to remain silent as to his pecuniary condition. An honest though abortive purpose to continue in business, and pay for the goods, is consistent with the vendee's knowledge of his own insolvency.* But there may

[1] See Remfrey *v.* Butler, El. Bl. & El. 887; Stray *v.* Russell, 1 El. & El. 888.

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* Cross *v.* Peters, 1 Greenl. 378; Nichols *v.* Pinner, 18 N. Y. 295; Bidault *v.* Wales, 19 Mo. 36; s. c. 20 Mo. 546; Mitchell *v.* Worden, 20 Barb. 253; Henshaw *v.* Bryant, 4 Scam. 97.

When a person, who knows himself to be insolvent, by means of fraudulent pretences or representations, obtains possession of goods under a pretence of purchase with the intention not to pay for them, but with the design to cheat the vendor out of them, a court of chancery will set aside the sale if they have not passed into the hands of a *bona fide* purchaser; or the vendor may bring replevin or trover for them. Durell *v.* Haley, 1 Paige, 492; Lupin *v.* Marie, 2 Paige, 172; Lloyd *v.* Brewster, 4 Paige, 541; Van Cliff *v.* Fleet, 15 Johns. 147; Allison *v.* Matthieu, 3 Johns. 235; Rowley *v.* Bigelow, 12 Pick. 312; Hitchcock *v.* Covill, 20 Wend. 167; Ask *v.* Putnam, 1 Hill, 302; Root *v.* French, 13 Wend. 570; Zabriskie *v* Smith, 13 N. Y. 330; Hunter *v.* Hudson River Iron Co., 20 Barb. 493.

In order to render a sale void on account of misrepresentations as to solvency, such a case must be made out as would authorize a jury to convict the purchaser of obtaining goods under false pretences. The means used to defraud must be such that a man of ordinary prudence would become the dupe of the deception. Henshaw *v.* Bryant, 4 Scam. 37.

A purchase by a person who knows himself to be insolvent, and has no reasonable expectation to pay for the goods, is fraudulent. Powell *v.* Bradlee, 9 G. & J. 220; Chaffee *v.* Fort, 2 Lans. 81; Seligman *v.* Kalkman,

be circumstances under which the concealment of a material and sudden change in the circumstances of a purchaser which he has reason to suppose to be unknown to a vendor, may amount to a fraud.[1] A dealer, for instance, who has been of known standing, but has suddenly failed in business, cannot go to those who were acquainted with his former position, but have not heard of his failure, and innocently purchase property on credit.[2] So, also, there is fraud if a vendee obtain goods upon credit, with a preconceived fraudulent design not to pay for them.[3] *

[1] Nichols *v.* Pinner, 4 Smith (Amer.) 295; Brown *v.* Montgomery, 6 Smith (Amer.) 287.

[2] Brown *v.* Montgomery, 6 Smith (Amer.) 287.

[3] Hennequin *v.* Naylor, 10 Smith (Amer.) 140.

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8 Cal. 207; Conyers *v.* Ennis, 2 Mason, 236; Rowley *v.* Bigelow, 12 Pick. 307; *contra*, Biggs *v.* Barry, 2 Curt. 259; Hall *v.* Naylor, 6 Duer, 71.

A contract is not invalidated because one party is mistaken in regard to the solvency of the other; nor is a mutual mistake as to the solvency of the vendee, sufficient. Lupin *v.* Marie, 6 Wend. 77.

The sale is void if the purchaser is insolvent at the time of receiving the goods. Pike *v.* Wieting, 49 Barb. 314.

There is a very broad line of distinction, both in morals and law, between the conduct of one who gets property into his possession with a preconceived design never to pay for it under color of a formal sale induced by a sham promise to pay, which the party never intends to comply with, and the conduct of a man deeply involved in debt, far, perhaps, beyond his means of payment, and who struggles, it may be, and frequently is, against all rational hope to sustain his credit, buys property on a promise to pay for it on short time in order to raise money from day to day, to meet immediate and more pressing demands. Bidault *v.* Wales, 20 Mo 546.

When a person has committed an open and notorious act of insolvency, it is his duty to communicate that fact to parties with whom he has previously dealt before he makes a new purchase, and the violation of such duty is a fraud. Mitchell *v.* Worden, 20 Barb. 253; Pequeno *v.* Taylor, 38 Barb. 375; Chaffee *v.* Fort, 2 Lans. 81.

* Hennequin *v.* Naylor, 24 N. Y. 139; Durell *v.* Haley, 1 Paige, 492; Harris *v.* Alcock, 10 G. & J. 226; Lane *v.* Robinson, 18 B. Mon. 623; Buckley *v.* Artcher, 21 Barb. 585; Mackinley *v.* McGregor, 3 Whart. 369;

The same rules as to false and deceptive statements, which are applicable to contracts between individuals, are also applicable to contracts between an individual and a company. No misstatement or concealment of any material fact or circumstances ought to be permitted in a prospectus to invite persons to become shareholders in a projected company. The public, who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character, as the promoters themselves possess. The promoters of companies, who invite persons to take shares on the faith of representations contained in prospectuses, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any way affect the nature, or extent, or quality of the privilege or advantage which the prospectus holds out as an inducement to take shares. It cannot be too strongly pressed upon those who, having projected an undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candor and honesty ought to characterize their published statements.[1] It is not merely by one or two statements in the prospectus which are not borne out by the facts, that

[1] New Brunswick, &c., Railway Co. *v.* Muggeridge, 1 Dr. & Sm 381, 382; Re Reese River Silver Mining Co., Smith's Case, L. R. 2 Ch. App. 609; Central Railway Co. of Venzuela *v.* Kisch, L. R. 2 App. Ca. 113, 114. See Kent *v.* Freehold Land and Brickmaking Co., L. R. 4 Eq. 599; Henderson *v.* Lacon, L. R. 5 Eq. 262; Chester *v.* Spargo, 16 W. R. 576.

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contra, Backentoss *v.* Speicher 31 Penn. 324; Smith *v.* Smith, 21 Penn. 367.

The intention never to pay for goods may be evidenced by a resale of them at a sacrifice, an assignment in insolvency, or to a favored creditor, or other circumstances. Bidault *v.* Wales, 19 Mo. 36; Hennequin *v.* Naylor, 24 N. Y. 139; Mackinley *v.* McGregor, 3 Whart. 369.

the matter ought to be tried, but by the combined effect of them all, producing a result which would have misled any person who took shares on the faith of the prospectus.[1] Though certain statements or suppressions standing alone, might not be sufficient ground to give a man a right to have a transaction set aside, yet another part of the case may lead to a different conclusion, and reflect upon the general fairness of the prospectus, even in those particulars.[2] That a man, who was induced to take shares by misrepresentation or concealment, was actually a member of the company at the time, is immaterial; but it is material that to relieve him from the transaction would prejudice the interests of an innocent shareholder who had acquired them after he had become a shareholder.[3]

Those who, having a duty to perform, represent to those who are interested in the performance of it, that it has been performed, make themselves responsible for all the consequences of the non-performance.[4]

The false and fraudulent representations of an agent, when acting within the scope of his authority, bind the principal.[5] A man cannot take any benefit under false and fraudulent representation made by his agent, although he may have been no party to the representations, and may not have distinctly authorized them.[6]* In respect of the liability of a principal

[1] Central Railway Co. of Venezuela *v.* Kisch, L. R. 2 App. Ca. 125.

[2] *Ib.* 117.

[3] Western Bank of Scotland v. Addie, L. R. 1 Sc. App. Ca. 163.

[4] Blair *v.* Bromley, 2 Ph. 360, *per* Lord Cottenham.

[5] Wilson *v.* Fuller, 3 Q. B. 77; Blair *v.* Bromley, 2 Ph. 350; Coleman *v.* Riches, 16 C. B. 104; Wheelton *v.* Hardisty 8 E. & B. 232, 260; Udell *v.* Atherton, 7 H. & N. 173.

[6] Nicoll's Case, 3 D. & J. 387, 437, *per* Turner, L. J.; Udell *v.* Atherton, 7 H. & N. 172, *per* Pollock, C. B., & Wilde, J.; New Brunswick, &c., Railway Co. *v.* Conybeare, 9 H. L. 714, 726, *per* Lord Westbury, *ib.* 739; *per* Lord

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* Elwell v. Chamberlain, 31 N. Y. 611; Mitchell v. Mims, 8 Tex. 6; Mundorf *v.* Wickersham, 63 Penn. 87; Bennett *v.* Judson, 21 N. Y. 238; Lobdell *v.* Baker, 1 Met. 193; Lawrence *v.* Hand, 23 Miss. 103; Concord

for the acts of his agent, done in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and any other wrong.[1] A man cannot adopt and take the benefit of a contract entered into by his agent, and repudiate the fraud on which it was built. If the agent, at the time of the contract, makes any representation or declaration touching the subject-matter, it is the representation and declaration of the principal. The statements of the agent which are involved in the contract, as its foundation or inducement, are in law the statements of the principal. The principal cannot separate the contract itself from that by which it was induced. He must adopt the whole contract, including the statements and representations which induced it, or must repudiate the contract altogether.[2] It would be inconsistent with natural justice, to permit a man to retain property acquired through the medium of false representations made by his agent, although he was no party to them, or did not authorize them.[3] * If an agent employs

Cranworth. See Archbold *v.* Lord Howth, L. R. Ir. 2 C. L. 608; but see Wilde *v.* Gibson, 1 H. L. 605. See, however, Sug. L. P. 641; Reynell *v.* Sprye, 1 D. M. & G. 684, *per* Knight Bruce, L. J., commenting on Wilde *v.* Gibson.

[1] Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 265. See Hern *v.* Nicholls, 1 Salk. 289.

[2] Udell *v.* Atherton, 7 H. & N. 184, *per* Pollock, C. B., & Wilde, B.; *ex-parte* Ginger, 5 Ir. Ch. 174; Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 265. See Archbold *v.* Lord Howth, L. R. Ir. 2 C. L. 608; comp. Solomon *v.* Honywood, 12 W. R. 572.

[3] New Brunswick, &c., Co. *v.* Conybeare, 9 H. L. 711; Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. Ca. 159; Oakes *v.* Turquand, L. R. 2 App. Ca. 325.

Bank *v.* Gregg, 14 N. H. 331; Bowers *v.* Johnson, 10 Smed. & Mar. 169; Mason *v.* Crosby, 1 Wood & Min. 342; Morton *v.* Scull, 23 Ark. 289; Griswold *v.* Haven, 25 N. Y. 595. Graves *v.* Spier, 58 Barb. 349.

A representation by an agent that a certain fact is not known to him, is not a denial of the existence of the fact or of the knowledge of his principal concerning it. Coddington *v* Goddard, 16 Gray, 436.

* Fitzsimmons *v.* Joslin, 21 Vt. 129; Veazie *v.* Williams, 8 How. 134; Crocker *v.* Lewis, 3 Sumner, 8; Bowers *v.* Johnson, 10 Smed. & Mar. 169;

another person to make representations, it is the same as if the representations had been made by him.[1]

In Cornfoot *v.* Fowke,[2] a man had employed an agent for the sale of property, who in the course of the treaty for sale made material representations respecting the property, which he honestly believed to be true, though they were false in fact and false to the knowledge of the principal; there being, however, no evidence to show a fraudulent purpose on the part of the principal, it was held that fraud and covin could not be pleaded in bar to an action by him on the contract. It was admitted, however, in the judgment that if a principal with knowledge of a fact material to the enjoyment of property employs an agent, whom he knows to be ignorant of that fact for the purpose of concealing it, he could not be permitted to avail himself of that concealment. Lord Abinger, C. B., differed from the majority of the court, being of opinion that if a principal employs an agent to sell property, and such agent in the course of his employment makes false representations respecting the property, he cannot take advantage of a contract induced by such representations, whether the agent was authorized by him or not to make the representations.

Cornfoot *v.* Fowke has been the subject of much comment. It has been explained by Lord Cranworth, in National Exchange Company *v.* Drew,[3] and Bartlett *v.* Salmon,[4] and by Willes, J., in Barwick *v.* English Joint Stock Bank,[5] as having turned on a point of pleading. Lord St. Leonards ac-

[1] Western Bank of Scotland *v.* Addie, L. R. 1 Sc. Ap. 159.
[2] 6 M. & W. 358.
[3] 2 Macq. 108.
[4] 6 D. M. & G. 39.
[5] L. R. 2 Exch. 262.

Hunt *v.* Moore, 2 Barr, 105; Hunter *v.* Hudson Riv. Iron Co. 20 Barb. 493; Franklin *v.* Elzell, 1 Sneed, 497.

cepted the explanation, but apparently with reluctance, in National Exchange Company *v.* Drew.[1] He stated it to be his opinion that the law will reach the case of a person so availing himself of the misrepresentations of his own agent, who might be ignorant of a fact material to the enjoyment of the property, although the principal himself knew it, and employed the agent in order to avoid making a direct representation to the contrary. He said that he would go farther, and would hold that although the representation was not fraudulent, the agent not knowing it was false, yet that as it in fact was false, and false to the knowledge of the principal, although the agent did not know it, it ought to vitiate the contract.[2] So also in Wheelton *v.* Hardisty,[3] Lord Campbell said that Westminster Hall was in favor of the opinion of Lord Abinger. In a carefully considered American case, Fitzsimmons *v.* Joslin,[4] Cornfoot *v.* Fowke was pronounced to be bad law.[5] The latest authority on the subject is a dictum of Lord Kingsdown, in Bristow *v.* Whitmore;[6] "If an agent," he said,[7] "makes a contract on behalf of his principal, whether with or without authority, the principal cannot at once approbate and reprobate it. He must adopt it altogether or not at all. He cannot at the same time take the benefits which it confers and repudiate the obligations which it imposes."[8] *

[1] 2 Macq. 144.
[2] *Ib.* 146.
[3] 8 E. & B. 270.
[4] 21 Verm. (Amer.) 129.
[5] See Bennett *v.* Judson, 7 Smith (Amer.) 238.
[6] 9 H. L. 418.
[7] 9 H. L. 418.
[8] See *Ex-parte* Ginger, 5 Ir. Ch. 174. See, also, Sug. L. P. 641; Reynell *v.* Sprye, 1 D. M. & G. 683, *per* Knight Bruce, L. J.; but see Wilde *v.* Gibson, 1 H. L. 605.

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* Hough *v.* Richardson, 3 Story, 689; Henderson *v.* Railroad Co. 17 Tex. 560; Crump *v.* U. S. Mining Co. 7 Gratt. 352.

A party can not avail himself of an advantage that has been obtained through the misrepresentation of a third person, although such third person is not his agent. Hunt *v.* Moore, 2 Barr, 105; Fitzsimmons *v.* Joslin, 21 Vt. 129.

A partnership firm is bound by false and fraudulent representations made by any of its members whilst acting within the scope and limits of his authority and having reference to the proper business of the firm,[1] but is not bound by statements made by him as to his authority to do that which the nature of the business of the firm does not impliedly warrant.[2]

A company or corporation is as much bound by the false and fraudulent representations of its authorized agents as an individual. If the directors of a company in the course of managing its affairs, or in the course of the business which it is their duty to transact induce a man by false or fraudulent misrepresentations to enter into a contract for the benefit of the company, the company is bound, and can no more repudiate the fraudulent conduct of its agents than an individual can.[3]* A company cannot retain any benefit which it may have obtained through the fraudulent representations of its

[1] Rapp *v.* Latham, 2 B. & Ald. 795; Lovell *v.* Hicks, 2 Y. & C. 46, 481; Blair *v.* Bromley, 5 Ha. 557, 2 Ph. 354; Wickham *v.* Wickham, 2 K. & J. 478.

[2] *Ex-parte* Agace, 2 Cox, 312.

[3] Burnes *v.* Pennell, 2 H. L. 497; Ranger *v.* Great Western Railway Co. 5 H. L. 86; National Exchange Co. *v.* Drew, 2 Macq 125, *per* Lord Cranworth; Meux Executors' Case, 2 D. M. & G. 522; Nicoll's Case, 3 D. & J. 387, 437; New Brunswick, &c., Railway Co. *v.* Conybeare, 9 H. L. 737, *per* Lord Cranworth.

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* Henderson *v.* Railroad Co. 17 Tex. 560; Litchfield Bank *v.* Peck, 29 Ct. 384; Crump *v.* U. S. Mining Co. 7 Gratt. 352; East Tenn. R. R. Co. *v.* Gammon, 5 Sneed, 567; Hester *v.* Memphis, &c., R. R. Co. 32 Miss. 378; River *v.* Plankroad Co. 30 Ala. 92; New Orleans, &c., R. R. Co. *v.* Williams, 16 La. Ann. 315.

Where representations made by an agent to obtain subscriptions are a part of a scheme of fraud participated in by the officers authorized to manage its affairs; or where they are such as the agent may reasonably be presumed by the subscriber to have the authority of the corporation to make, his representations are relevant to show the fraud by means of which the subscription was procured. But where there is no reasonable presumption of authority, and no actual authority, the corporation will not be prejudiced by the unauthorized acts of the agent. Custar *v.* Titusville Water & Gas Co. 63 Penn. 381.

agents, but is responsible to the extent to which it may have profited from such representations.[1]

The rule that a company cannot retain any benefit which it may have obtained through the false and fraudulent representations of its agents, applies to the case of a member of the company, who was induced by such representations to take additional shares.[2]

A principal, however, is not bound by the false and fraudulent representations of his agent, unless the agent be acting within the scope of his authority.[3] A joint-stock company, for instance, is not bound by the statements of one of its members, unless he is also the agent of the company, and unless his business be to make statements on its behalf.[4] Nor is a company bound by the statements of one of the directors, or of its manager, or secretary, or of a clerk, if he is not singly an agent of the company.[5] The rule that companies are bound by the misrepresentations of the directors applies only to the case of directors acting as a body.[6]

Referees for information respecting a life to be assured are not thereby constituted the agents of the insured. If their information is false and fraudulent, but not to the knowledge of the assured, the insurer is not entitled to avoid the policy on the ground that it was induced by the fraud of the agent of the insured.[7]

[1] Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. Ca. 157; Oakes *v.* Turquand, L. R. 2 App. Ca. 325; Henderson *v.* Lacon, L. R. 5 Eq 261. See Barry *v* Crosskey, 2 J. & H. 1.

[2] Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. Ca. 163.

[3] Bernard's Case, 5 Deg. & S. 283; Ayres Case, 25 Beav. 513; Burnes *v.* Pennell, 2 H. L. 497; Nicoll's Case, 3 D. & J. 387, 437; Wollaston's Case, 4 D. & J. 437; Att.-Gen. *v.* Briggs, 1 Jur. N. S. 1034; New Brunswick, &c., Railway Co. *v.* Conybeare, 9 H. L.711. See Barry *v.* Crosskey, 2 J. & H. 27.

[4] Burnes *v.* Pennell, 2 H. L. 497.

[5] Hold's Case, 22 Beav. 48; Ayre's Case. 25 Beav. 513; Gibson's Case, 2 D. & J. 275; Nicoll's Case, 3 D. & J. 387; *Ex-parte* Frowd, 30 L. J. Ch. 322; Wollaston's Case, 4 D. & J. 437.

[6] Nicoll's Case, 3 D. & J. 387, 440. See National Exchange Co. *v.* Drew, 24 Dec. of Court of Session, 2d series, p. 1.

[7] Wheelton *v.* Hardisty, 8 E. & B. 232.

An agent whose authority is unknown cannot bind his principal by misrepresenting the authority conferred.[1]

Although a principal is not bound by the statements of an agent when not acting within the scope of his authority, the case is different if a principal knows that a man is dealing with his agent under the belief that all statements made by the agent are warranted by the principal, and so knowing, allows him to expend moneys in that behalf. A court of equity will not afterwards allow the principal to set up the want of authority of the agent. The knowledge must, however, be brought home to the principal.[2]

In Brockwell's Case,[3] Kindersley, V.-C., held that if the directors of a company in the exercise of their ordinary functions make a false report to the company, who adopt it, and the report finds its way into the hands of a man who takes shares on the faith of it, he could not be held liable.[4] The authority of the case has been, on two occasions,[5] questioned by Lord Chelmsford.[6] He has expressed himself as of opinion that a company is not bound by false statements contained in reports of the directors of the company, which have been adopted at a general meeting but do not affect to give any more knowledge than what was contained in the directors' report; and which, although they have been published and have got into the hands of the public, have not been industriously circulated by the company. The distinction, however, suggested and taken by his Lordship does not seem sound law. In two late cases,[7] Kindersley, V.-C., said that he adhered to the opinion he had expressed in Brockwell's Case; and the weight of authorities is in favor of the opinion of his Honor.[8]

[1] Story on Agency.

[2] Ramsden *v.* Dyson, L. R. 1 App. Ca. 129, *per* Lord Cranworth.

[3] 4 Drew, 205.

[4] See National Exchange Co. *v.* Drew, 2 Macq 103.

[5] Nicoll's Case, 3 D. & J. 427; New Brunswick, &c., Railway Co. *v.* Conybeare, 9 H. L. 749.

[6] See, also, Mixer's Case, 4 D. & J. 583.

[7] Worth's Case, 4 Drew, 532; Barrett's Case, 2 Dr. & Sm. 415, 5 N. R. 460.

[8] See National Exchange Co. *v.* Drew,

The general interests of society demand that, as between an innocent company on the one hand and an innocent individual defrauded by the company on the other, misrepresentations by the directors of a company shall bind the company, although the shareholders may be ignorant of the representations and of their falsehood.[1] It may be said that the reports of directors are not made *by* the company, but *to* the company; but the argument though plausible is not sound. The reports of directors though addressed to the shareholders are made under such circumstances that what they so report is known, and intended to be known, not only to the shareholders, but to all persons who may be minded to be shareholders just the same as if they were published to the world: and the exigencies of mankind require that reports so made and circulated should be deemed to be the reports of the company.[2] The case becomes all the stronger, if the reports of directors have been adopted at a general meeting of the shareholders. After adoption a report is the act of the company and not simply of the directors.[3] If after adoption a report is industriously circulated, misstatements contained in it must be taken to be made with the authority of the company.[4]

The principle which treats non-disclosure as equivalent to fraud, when the circumstances impose a duty that disclosure should be made, obtains specially in respect to policies of assurance. The contract of assurance being essentially a contract of good faith, inasmuch as the risk which the insurer undertakes can only be learnt from the representations of the party proposing the insurance, courts of justice proceed upon a doctrine strictly analogous to that of the Roman law, and

125, *per* Lord Cranworth, *ib.* 143, *per* Lord St. Leonards; Nicoll's Case, 3 D. & J. 387, *per* Turner, L. J.

[1] National Exchange Co. *v.* Drew, 2 Macq. 125.

[2] National Exchange Co. *v.* Drew, 2 Macq. 125, *per* Lord Cranworth.

[3] *Ib.* 143, *per* Lord St. Leonards.

[4] New Brunswick, &c., Railway *v.* Conybeare, 9 H. L. 711. See Barrett's Case, 2 Dr. & Sm. 415.

regard non-disclosure as fatal to the validity of the transaction.[1] *

The rule with respect to the duty of disclosure applies with peculiar force in the case of policies of marine insurance. The validity of a contract of marine insurance being conditional upon the completeness, the truth, and the accuracy of the representations of the party proposing the insurance as to the risk, he is bound to make known to the underwriter everything within his knowledge which is of a nature to increase the risk which he is asked to undertake. There are many matters as to which he may be innocently silent. He is not bound to mention facts and circumstances which are within the ordinary professional knowledge of an underwriter: nor is he bound to communicate things which are well known to both parties, or which he is warranted in assuming to be within the knowledge of the party who is asked to undertake the risk; as, for instance, where a fact is one of public notoriety, as of war, or where it is a matter of inference and the materials for forming a judgment are common to both parties. But he is bound to communicate every fact which he is not entitled to assume to be in the knowledge of the underwriter. He may not, however, speculate as to what may or may not be in the mind of the underwriter, or as to what may or may not be brought to his mind by the particulars disclosed to him. It is not enough that the underwriter be furnished with materials from which he may, by a course of reasoning and effort of memory, see the extent of the risk. The matter must not

[1] Carter *v.* Boehm, 3 Burr. 1905; Lindenau *v.* Desborough, 8 B. & C. 586.

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* Clark *v.* Man. Ins. Co. 8 How. 235; Fletcher *v.* Commonwealth Ins. Co. 18 Pick. 419; Walden *v.* Louisiana Ins. Co. 12 La. 134; N. Y. Bowery Ins. Co *v.* N. Y. Ins. Co. 17 Wend. 359.

be left to speculation or peradventure. If the particulars furnished to the underwriter fall short of what the party proposing the insurance is bound to communicate, the contract is vitiated. It is immaterial whether the omission to communicate a material fact has arisen from intention, or indifference, or mistake, or from it not being present to the mind of the party proposing the insurance that the fact was one which ought to have been disclosed.[1] The insurer is bound to communicate not only every material fact of which he has actual knowledge, but every material fact of which he ought in the ordinary course of business to have knowledge, and must take all necessary measures by the employment of competent and honest agents to obtain through the ordinary channels of intelligence in use in the mercantile world all due information as to the subject-matter of the insurance. If by the fraud or negligence of his agent the party proposing the insurance is kept in ignorance of a fact material to the risk, and through such negligence fails to disclose it, the contract is vitiated.[2] An underwriter may, however, in any particular case limit the right of full disclosure which he has by law to that of being informed of what is in the knowledge of the party proposing the insurance, not only as to its existence in point of fact, but also to its materiality.[3]

It was formerly considered that policies of assurance on lives, like policies of insurance on ships, were made conditionally upon the truth or completeness of the representations respecting the risk, and that misrepresentation or concealment of a material fact, although not fraudulent, vitiated the policy.[4] But it is now determined that such is not the case. The assured is always bound not only to make a true answer to the ques-

[1] Carter *v.* Boehm, 5 Burr. 1905; Bates *v.* Hewitt, L. R. 2 Q. B. 595, 605, 606, 610.

[2] Proudfoot *v.* Montefiore, L. R. 2 Q. B. 511.

[3] Jones *v.* Provincial Insurance Co. 3 C. B. N. S. 86.

[4] Lindenau *v.* Desborough, 8 B. & C. 586; Jones *v.* Provincial Insurance Co. 3 C. B. N. S. 86.

tions put to him, but to disclose spontaneously any fact exclusively within his knowledge, which it is material for the insurer to know. But it is not an implied condition of the validity of the policy that the insured should make a complete and true representation respecting the life proposed for insurance. Such condition, if intended, must be made a matter for express stipulation. If there be no warranty or condition on the part of the party proposing the insurance, the insurer is subject to all risks, unless he can show a fraudulent concealment or misrepresentation, or a non-communication of material facts known to the assured.[1] It is, however, an implied condition that the person whose life is assured is alive at the time of making the policy. The policy is void if the person whose life is assured was dead at the date of the policy, though neither party to the policy was aware of his death.[2] If there is a proviso that the policy shall not be disputed on the ground of merely untrue statements, not fraudulently made, a misrepresentation or concealment undesignedly made does not avoid the policy.[3] An insurer may limit his right to that of being informed of what is in the knowledge of the party proposing the insurance, not only as to its existence in point of fact, but also as to its materiality.[4]

Policies of insurance against fire are made upon the implied condition that the description of the property inserted in the policy is true at the time of making the policy;[5] and there is an implied condition that the property shall not be altered during the term for which it is insured, so as to increase the risk.[6] In effecting an insurance against fire, it is the duty of

[1] Wheelton *v.* Hardisty, 8 E. & B. 232.

[2] Pritchard *v.* Merchants' Life Assurance Society, 3 C. B. N. S. 622.

[3] Fowkes *v.* Manchester and London Life Assurance Co. 3 B. & S. 917. See Wood *v.* Dwarris, 11 Exch. 493; Reis *v.* Scottish Equitable Life Assurance Co. 2 H. & N. 19; Wheelton *v.* Hardisty, 8 E. & B. 232.

[4] Jones *v.* Provincial Insurance Co. 3 C. B. N. S. 86.

[5] Sillem *v.* Thornton, 3 E. & B. 868.

[6] *Ib.*; Stokes *v.* Cox, 1 H. & N. 533.

the party proposing the insurance to communicate to the insurer all material facts within his knowledge touching the property.[1] But the insurer may limit his right to that of being informed of what is in the knowledge of the party proposing the insurance, not only as to its existence in point of fact, but also as to its materiality.[2]

The strict rule with respect to non-disclosure, which obtains in the case of policies of insurance, does not extend to contracts of suretyship or guarantee.[3] If the creditor be specially communicated with on the subject, he is bound to make a full, fair, and honest communication of every circumstance within his knowledge, calculated in any way to influence the discretion of the surety, on entering into the required obligation.[4] But he is not under any duty to disclose to the intended surety voluntarily and without being asked to do so, any circumstances unconnected with the particular transaction in which he is about to engage, which will render his position more hazardous, or to inform him of any matter affecting the general credit of the debtor, or to call his attention to the transaction, unless there be something in it which might not naturally be expected to take place between the parties.[5] If the intended surety desires to know any particular matter of which the creditor may be informed, he must make it the subject of a distinct inquiry.[6] But if there be anything in the transaction that might not naturally be expected to take place between the parties concerned in it, the knowledge of which it

[1] Lindenau *v.* Desborough, 8 B. & C. 592; Bufe *v.* Turner, 6 Taunt. 338.

[2] Jones *v.* Provincial Insurance Co. 3 C. B. N. S. 86.

[3] North British Insurance Co. *v.* Lloyd, 10 Exch. 523; Wythes *v.* Labouchere, 3 D. & J. 609; Lee *v.* Jones, 17 C. B. N. S. 482. See Greenfield *v.* Edwards, 2 D. J. & S. 582.

[4] Owen *v.* Homan, 3 Mac. & G. 378; Blest *v.* Brown, 8 Jur. N. S. 602; Greenfield *v.* Edwards, 2 D. J. & S. 582, 598. See Smith *v.* Bank of Scotland, 1 Dow, 272.

[5] Hamilton *v.* Watson, 12 Cl. & Fin. 119; Small *v.* Currie, 2 Drew. 102; Wythes *v.* Labouchere, 3 D. & J. 593, 609. See Greenfield *v.* Edwards, 2 D. J. & S. 582.

[6] Hamilton *v.* Watson, 12 C. L. & Fin. 109; Wythes *v.* Labouchere, 3 D. & J. 609. See Greenfield *v.* Edwards, 2 D. J. & S. 582.

is reasonable to infer would have prevented the surety from entering into the transaction, the creditor is under an obligation to make the disclosure.[1] If, for instance, there be any private arrangement, or secret understanding, between the creditor and the debtor connected with the particular transaction, in which he is about to engage, whereby the risk of the surety is increased,[2] or his position is so materially varied, that he is not in the position, in which he might reasonably have contemplated to be;[3] or if a party having reason to suspect the fidelity of his clerk requires security in such a way as to hold him out as one whom he considers a trustworthy person,[4]* or if the creditor has notice that the circumstances under which the debtor has obtained the concurrence of the surety lead to the suspicion of fraud;[5] concealment is fraudulent and will vitiate the transaction.[6] "It must in every case," said Blackburn, J., in Lee *v.* Jones,[7] "depend on the nature of

[1] Hamilton *v.* Watson, 12 Cl. & Fin. 109, 119; Lee *v.* Jones, 17 C. B. N. S. 503; Burke *v.* Rogerson, 12 Jur. N. S. 635. See Squire *v.* Whitton, 1 H. L. 333; Greenfield *v.* Edwards, 2 D. J. & S. 582; Rhodes *v.* Bate, L. R. 1 Ch. App. 252; Barwick *v.* English Joint Stock Bank, 2 L. R. Exch. 259.

[2] Pidcock *v.* Bishop, 3 B. & C. 605.

[3] Evans *v.* Bremridge, 2 K. & J. 174; 8 D. M. & G. 100; Spaight *v.* Cowne, 1 H. & M. 359.

[4] Smith *v.* Bank of Scotland, 1 Dow, 272.

[5] Owen *v.* Homan, 4 H. L. 997; Lee *v.* Jones, 17 C. B. N. 503; Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252. See Guardians of Stokesley Union *v.* Strother, 22 L. T. 84.

[6] See Squire *v.* Whitton, 1 H. L. 333.

[7] 17 C. B. N. S. 506.

* A person can not be considered as guilty of fraud in law by omitting to make known facts of an important character affecting the risk of the surety when it does not appear that he had an opportunity to do so. On the contrary, when he does know such facts, and has reason to believe that they are not known to the proposed surety, if information be sought from him, or if he have a sui able opportunity, and the facts are of such a character that they are not found in the usual course of that kind of business, and are such as materially to increase the risk, it is his duty to make them known. To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risk will be materially increased, well knowing that there are such circumstances, and having reasonable opportunity to make them known, is a legal fraud by which the surety will be relieved from the contract. Franklin Bank v. Cooper, 36 Me. 179; s. c. 37 Me. 542.

the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist, and that fact must be generally a question of fact for the jury."

In order that a compromise may be supported in equity, it is essential that the parties should have acted with equal knowledge, or at least equal means of knowledge in the matter. If one of the parties has knowledge of a material fact, which he withholds from the others, and which they have not reasonable means of knowing, the transaction cannot stand. A compromise cannot be approved of where one party knows only so much of his rights as the opposite party chooses to apprise him of. To constitute a fair compromise of a doubtful right, the facts creating the doubt should be equally known by all the parties. There must be a full and fair communication of all material circumstances affecting the question, which forms the subject-matter of the agreement, which are within the knowledge of the several parties, and which the others have not reasonable means of knowing, whether such information be asked for by them or not. There must not only be good faith and honest intention, but full disclosure, and without full disclosure honest intention is not sufficient.* A party to a compromise who has knowledge of a fact, must not take upon himself to decide that the suppressed fact is immaterial, if it could by any possibility have had any influence on the decision of the other party.[1] If the compromise is a transac-

[1] Gibbons *v.* Caunt, 4 Ves. 840; Walker *v.* Symonds, 3 Sw. 1; Gordon *v.* Gordon, *ib.* 471; Leonard *v.* Leonard, 2 B. & B. 180; Hotchkiss *v.* Dickson, 2 Bligh,

* Trigg *v.* Read, 5 Humph. 529; Carr *v.* Callaghan, 3 Litt. 365.

Concealment will not invalidate a compromise unless a loss has been occasioned thereby. Currie *v.* Steele, 2 Sandf. 542.

A compromise with knowledge of all the facts is valid although the adverse party has expressed an unfounded opinion upon his rights. Blake *v.* Pick, 11 Vt. 483; Saltonstall *v.* Gordon, 33 Ala. 49; Birdsong *v.* Birdsong, 2 Head. 289.

tion in the nature of a family arrangement, or if, under the circumstances of the case, it was the duty of the one party to see that the nature of the transaction was fully explained to the other, these principles apply with peculiar force.[1] But if the parties to a family arrangement are not on good terms, and are really at arms' length, the ordinary rules as to disclosure in family arrangements have no place.[2]

The rule with respect to compromises, which applies between private individuals, is not less applicable to compromises by the courts on behalf of infants. The orders of the court cannot be set aside on grounds less strong than those which would be required to set aside transactions between competent parties.[3]

The most comprehensive class of cases in which equitable relief is sought on the ground of concealment, is in the case of transactions between persons standing in a fiduciary relation to each other. In all such cases the party who fills the position of active confidence, is under an equitable obligation to disclose to the party towards whom he stands in such relation, every material fact which he himself knows calculated to influence his conduct on entering into the transaction. The suppression of any material fact renders the transaction impeachable in equity.[4] This subject will come into review in a

348; Stewart *v.* Stewart, 6 Cl. & Fin. 911; Harvey *v.* Cooke, 4 Russ. 34, Pickering *v.* Pickering, 2 Beav. 56; Scott *v.* Scott, 11 Ir. Eq. 75; Goymour *v.* Pigge, 13 L. J. Ch. 322; Bainbrigge *v.* Moss, 3 Jur. N. S. 58; Davis *v.* Chanter, 3 W. R. 321; Greenwood *v.* Greenwood, 2 D. J. & S. 28; Brooke *v.* Lord Mostyn, *ib* 373. See Lloyd *v.* Passingham, Coop. 152; M'Kellar *v.* Wallace, 8 Moo. P. C. 378; Trigge *v.* Lavallée, 15 Moo. P. C. 270; Cooke *v.* Greves, 30 Beav. 378.

[1] Dunnage *v.* White, 1 Sw. 137; Gordon *v.* Gordon, 3 Sw. 400; Leonard *v.* Leonard, 2 B. & B. 180; Harvey *v.* Cooke, 4 Russ. 58; Pickering *v.* Pickering, 2 Beav. 56, 3 Jur. 743; Smith *v.* Pincombe, 3 Mac. & G. 653; Davis *v.* Chanter, 3 W. R. 321; Greenwood *v.* Greenwood, 2 D. J. & S. 28. See Brent *v.* Brent, 10 L. J. Ch. 84.

[2] Irvine *v.* Kirkpatrick, 7 Bell's Sc. App. Ca. 186, 209.

[3] Brooke *v.* Lord Mostyn, 2 D. J. & S. 416.

[4] Walker *v.* Symonds, 3 Sw. 1; Wood *v.* Downes, 18 Ves. 120; Bulkley *v.* Wilford, 2 Cl. & Fin. 102, 177–181; Maddeford *v.* Austwick, 1 Sim. 89; Lloyd *v.* Attwood, 3 D. & J. 614; Tomson *v.* Judge, 3 Drew. 306.

subsequent page, where the peculiar equities between persons standing in these predicaments come into consideration.

The principle of law, that a man who makes a representation to another in such a way, or under such circumstances, as to induce him to believe that it is meant to be acted on, is liable as for a fraud, in the event of the representation proving to be false, and damage thereby accruing to the party to whom it was made, though common to both law and equity,[1] is not so general in its application at law as in equity. It is not necessary, nor, perhaps, would it be easy to define the limits of its application at law, but in equity the principle is of very general application, and is the foundation of a very comprehensive and most salutary part of the jurisdiction. A man who has so conducted himself as to cause a reasonable man to believe in the existence of a particular fact, or state of facts, or things, and to believe that the representation, as conveyed to his mind, was meant to be acted on, will not be permitted by a court of equity to derogate from interests which have been created, or rights which have been acquired on the faith of the existence of such a fact, or state of facts or things, by showing that the fact, or state of facts or things, was not such as he represented it to be, or by determining the actual state of things which he has so held forth as the consideration for the change of his condition by the other, or to enforce his legal right, if any, against him, unless the latter has received the benefit which he contemplated at the time he was induced to alter his condition.[2] *

[1] *Supra*, p. 53.

[2] West *v.* Jones, 1 Sim. N. S. 207; Major *v.* Major, 1 Drew. 165; Somersetshire Canal Co. *v.* Harcourt, 2 D. & J. 609; Pigott *v.* Stratton, John. 359, 1 D. F. & J. 49; Cooper *v.* Joel, 1 D. F. & J. 240; Dendy *v.* Cary, 9 Jur. N. S. 845; Youmans *v.* Williams, L. R. 1 Eq. 185.

* If a party so conducts himself as wittingly and willingly to lead another into the belief of a fact whereby he would be injured if the fact

The principle is not limited to cases where a distinct representation has been made, but applies equally to cases where a man, by his silence, produces a false impression on the mind of another.[1] If a man has been silent, when in conscience he ought to have spoken, he is debarred in equity from speaking when conscience requires him to be silent.[2] If a party has an interest to prevent an act being done, and he acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the acts to their prejudice, than he would have, had it been done by his previous license.[3] Parties who stand by without asserting their rights, and allow others to incur liabilities which they might not have incurred if those rights had been asserted, cannot set up those rights in a court of equity as against those by whom such liabilities have been incurred.[4] When, for instance, a man builds or lays out moneys upon land, supposing it to be his own, and believing he has a good title, and the real owner, perceiving his mistake, abstains from setting him

[1] *Supra*, p. 94.
[2] Niven *v.* Belknap, 2 Johns. (Amer), 573, *per* Thompson, C. J.
[3] Cairncross *v.* Lorimer, 7 Jur. N. S. 150, *per* Lord Campbell.
[4] Olliver *v.* King, 8 D. M. & G. 118, *per* Turner, L. J.; Lindsay *v.* Gibbs, 3 D. & J. 697.

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were not as so apprehended, the person inducing the belief will be estopped from denying it to the injury of such person. Crockett *v.* Lashbrock, 5 Mon. 530; Watson *v.* McLaren, 19 Wend. 557; Petere *v.* Foster, 21 Wend. 172; Davis *v.* Thomas, 5 Leigh, 1; Bank *v.* Wollaston, 3 Harring. 90; Hicks *v.* Cram, 17 Vt. 449; Clements *v.* Loggins, 2 Ala. 514; Roe *v.* Jerome, 18 Ct. 138; Croat *v.* De Wolf, 1 R. I. 393; Robinson *v.* Justice, 2 Penn. 19; Cowles *v.* Baco, 21 Ct. 451.

The fact that his conduct arose from carelessness or negligence is no excuse. Cady *v.* Owens, 34 Vt. 598.

The doctrine has no application where a mistake as to title is mutual, and the person having no title has not expended any money. Stuart *v.* Luddington, 1 Rand. 403.

right, and leaves him to persevere in his error;* or where a man, under an expectation created or encouraged by the owner

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* Mere silence and the making of improvements by others, is not sufficient. There must be some ingredient in the transaction which would make it a fraud in the owner to insist upon his legal right. Silence will postpone only where silence is a fraud. Folk *v.* Birdelmar, 6 Watts, 339; Crest *v.* Jack, 3 Watts, 238; Devereux *v.* Burgwyn, 5 Ired. Eq. 351; Nevin *v.* Belknap, 2 Johns. 373; Clabaugh *v.* Byerly, 7 Gill. 354.

Several things are essential to be made out in order to the operation of the rule. 1st. The act or declaration of the person must be wilful, that is with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party. 2d. He must at least be aware that he is giving countenance to the alteration of the conduct of the other party. 3d. And it must appear that the other party has changed his position by reason of such inducement. Copeland *v.* Copeland, 23 Me. 525; Morton *v.* Hogdon, 32 Me. 127; Morris *v.* Moore, 11 Humph. 433; Taylor *v.* Zipp, 14 Mo. 482; Carpenter *v.* Stillwell, 12 Barb. 128; Eldred *v.* Hazlett, 33 Penn. 307.

The word "wilfully," as used in this connection, is not to be taken in the limited sense of the term "maliciously," or of the term "fraudulently;" nor does it necessarily imply an active desire to produce a particular impression, or to induce a particular line of conduct. Whatever the motive may be, if one so acts or speaks that the natural consequence of his words and conduct will be to influence another to change his condition, he is legally chargeable with an intent, a wilful design to induce the other to believe him and to act upon that belief, if such proves to be the actual result. Preston *v.* Mann, 25 Ct. 118.

If a party has misled another under such circumstances that he had no reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying, he will not be bound by his representations. If a stranger hears and acts upon his representations the doctrine does not apply. Morgan *v.* Spangler, 4 Ohio St. R. 102.

A refusal to speak with a reason given for it is not the same thing as silent acquiescence in what another is saying. Taylor *v.* Ely, 25 Ct. 250.

The rule does not apply where the means and opportunity of tracing title are equally open to both parties. It can only be held to apply against one who claims under some trust lien or other right not equally open and apparent to both parties. Tongue *v.* Nutwell, 17 Md. 212.

The improvements must be of such a character as to show that the party placed them there in confidence of his being the owner of the land. Caldwell *v.* Williams, 1 Bailey's Ch. 175.

Although the right of the party who thus misleads third persons by his silence is merely a reversionary interest, and subject to a life estate in

of land that he shall have a certain interest, takes possession of such land, with the consent of the owner, and upon the faith of such promise or expectation, with the knowledge of the former, and without objection by him, lays out moneys upon the land; in such cases a court of equity will not afterwards allow the real owner or the landlord, as the case may be, to assert his legal right against the other, without at least making him a proper compensation for the expenditure which he has incurred.[1]* If the works on which moneys have been laid out are of a permanent character, or are works which point to permanence, the court will not allow them to be interfered with, even upon the payment of a proper compensation. A man who by his conduct has encouraged another to spend moneys on his land, in erecting works of a permanent character, cannot be permitted to put an end to the very thing which he has approved. All that he is entitled to is a proper compensation in

[1] East India Co. *v.* Vincent, 2 Atk. 83; Dann *v.* Spurrier, 7 Ves. 235; Shannon *v.* Bradstreet, 1 Sch. & Lef. 52; Gregory *v.* Migheil, 18 Ves. 328; Cawdor *v.* Lewis, 1 Y. & C. 427; Garrard *v.* O'Reilly, 3 Dr. & War. 414; Clare *v.* Harding, 6 Ha. 273; Powell *v.* Thomas, *ib.* 305; Duke of Leeds *v.* Lord Amhurst, 2 Ph. 117; White *v.* Wakley, 26 Beav. 20; Laird *v.* Birkenhead Railway Co. John. 514; Harcourt *v.* White, 28 Beav. 303; Archbold *v.* Scully, 9 H. L. 360; O'Fay *v.* Burke, 8 Ir. Ch. 225; Burke *v.* Prior, 15 Ir. Ch. 106. See Ramsden *v.* Dyson, L. R. 1 App. Ca. 129; Nunn *v.* Fabian, L. R. 1 Ch. App. 35.

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the very person whom he suffers to deal with the property as absolute owner, the rule of equity still applies. Higginbotham *v.* Barnett, 5 Johns. Ch. 184; Barclay *v.* Davidson, 63 Penn. 406.

A party who encourages another to buy up a piece of property, can not afterwards buy up a better title and assert it. Beaupland *v.* McKeen, 28 Penn. 124; Davis *v.* Handy, 37 N. H. 65.

At law neither concealment nor misrepresentation are an estoppel, and there is no rule which precludes a party from showing his title. Jones *v.* Sasser, 1 Dev. & Bat. 462; West *v.* Tilghman, 9 Ired. 163; McPherson *v.* Walters, 16 Ala. 714; Miller *v.* Platt, 5 Duer, 272; *contra*, Corbett *v.* Norcross, 35 N. H. 99; Corkhill *v.* Landers, 44 Barb. 218.

* Swain *v.* Seamens, 9 Wall. 254; Town *v.* Needham, 3 Paige, 546; Hall *v.* Fisher, 9 Barb. 17; Carr *v.* Wallace, 7 Watts, 394; Eply *v.* Witherow, 7 Watts, 163.

respect of the land which has been taken.[1] The principle applies to companies as well as individuals.[2] The case in which the principle has been carried to the farthest extent is Clavering *v.* Thomas.[3] It was there held that a man who has stood by and allowed moneys to be spent in opening a mine, which he knew could only be worked by a wayleave over his own land, was bound in equity to give the wayleave.

Another illustration of the principle that a man who remains silent when there is a duty to speak is bound in equity, is where a man claiming a title in himself to property is privy to the fact of another, with color of title, or pretending to title, dealing with the property, as being his own, or as being unincumbered, and conceals his claim. A man who claims an interest in property need not voluntarily communicate the existence of his claim to a person whom he knows to be about purchasing the property,[4] but the suppression or concealment of his claim is a fraud in the sense of a court of equity, if a man is privy to the fact that the apparent owner or party in possession is about to deal with the property as his own, and as unincumbered, and he does not give the party, with whom he is about to deal, notice of his right. He will not be permitted by a court of equity to set up afterwards his own interest against a title created by the other.[5]* In a case where a

[1] Duke of Beaufort *v.* Patrick, 17 Beav. 60; Somer-etshire Canal Co. *v.* Harcourt, 2 D. & J 596; Mold *v.* Wheatcroft, 27 Beav. 516. See Bell *v.* Midland Railway Co., 3 D. & J. 673.

[2] Hill *v.* South Staffordshire Railway Co., 11 Jur. N. S. 192.

[3] Cit. 5 Ves. 689, 6 Ha. 304.

[4] See Rooper *v.* Harrison, 2 K. & J. 103; Mangles *v.* Dixon, 3 H. L. 739.

[5] Teasdale *v.* Teasdale, Sel. Ca. Ch. 59; Hunsden *v.* Cheyney, 2 Vern. 150; Raw *v.* Pote, *ib.* 239; Draper *v.* Borlase, *ib.* 370; Ibbotson *v.* Rhodes, *ib.* 554; Savage *v.* Foster, 9 Mod. 36; Berrisford *v.* Milward, 2 Atk. 49; Beckett *v.* Cordley, 1 Bro. C. C. 357; Govett *v.* Richmond, 7 Sim. 1; Brown *v.* Thorpe, 11 L. J. Ch. 73; Boyd *v.* Bolton, 1 J. & L. 730; Thompson *v.* Simpson, 2 J. & L. 110; Nicholson *v.* Hooper, 4 M. & C. 179; Zulueta *v.* Tyrie, 15 Beav. 591; Mangles *v.* Dixon, 3 H. L. 739; Olliver *v.* King, 8 D. M. & G. 110; Davies *v.* Davies, 6 Jur. N. S. 1322; Upton *v.* Vanner, 1 Dr. & Sm. 594; Hooper *v.* Gumm, L. R. 2 Ch. App. 282.

* Wendell *v.* Van Renssler, 1 Johns. Ch. 344; Lee *v.* Porter, 6 Johns. Ch. 268; Eagle *v.* Burns, 5 Call. 463; Harrison *v.* Edwards, 8 Litt. 340;

mother heard her son before his marriage declare that a certain term was to come to him at her death, and was witness to a deed, whereby the reversion was settled on the issue of the marriage, she was held compellable in equity to make good the settlement.[1] So, also, in a case where a man having a claim upon property, which was the subject of a reference, knew that the arbitration was going on but did not bring forward his claim, he was held bound by the award.[2] In Mocatta *v.* Murgatroyd,[3] the principle was applied in the case of a first mortgagee, from the mere circumstance of his being a witness to a second mortgage, but the case goes too far. In order to postpone a prior mortgage, it is necessary to prove against him fraud or actual notice of the subsequent mortgage.[4]

[1] Hunsden *v.* Cheyney, 2 Vern. 150.
[2] Govett *v.* Richmond, 7 Sim. 1.
[3] 1 P. W. 393.
[4] Beckett *v.* Cordley, 1 Bro. C. C. 353

Storrs *v.* Barker, 6 Johns. Ch. 166; Ten Eick *v.* Simpson, 1 Sandf. Ch. 244; Allen *v.* Winston, 1 Rand. 65; Skirving *v.* Neufville, 2 Dessau. 194; Lasselle *v.* Barnett, 1 Blackf. 139; Dickenson *v.* Davis, 2 Leigh, 401; Howland *v.* Scott, 2 Paige, 406; Raugley *v.* Spring, 8 Shep. 130; Bird *v.* Benton, 2 Dev. 179; Governor *v.* Freeman, 4 Dev. 472; Dewey *v.* Field, 4 Met. 381; Thompson *v.* Sanborn, 11 N. H. 201; Tomlin *v.* Den, 4 Harris, 76; Ivers *v.* Chandler, 1 Chipman, 48; Skinner *v.* Strouse, 4 Mo. 93; Brothers *v.* Porter, 6 B. Mon. 106; Cox *v.* Buck, 3 Strobh. 367; March *v.* Weekerly, 13 Penn. 250; Danley *v.* Rector, 5 Eng. 211.

The assent is as much to be inferred from the encouragement to pay a small sum as the whole purchase money, for the purchaser, inferring such assent from such payment, may reasonably go on thereafter to complete his purchase. Eagle *v.* Burns, 5 Call. 463.

The fact that the title is a matter of record is no defence to the owner. Carr *v.* Wallace, 7 Watts, 394; Epley *v.* Witherow, 7 Watts, 163.

If the truth is known to both parties, or if both parties have equal means of information, the rule does not apply. Catlin *v.* Grote, 4 E. D. Smith, 296; Tongue *v.* Nutwell, 17 Md. 212.

A party who stands by at a sale under an execution, may by his conduct preclude himself from afterwards setting up title to the property sold. M'Donald *v.* Lindall, 3 Rawle, 492; Epley *v.* Witherow, 7 Watts, 163; Keeler *v.* Vantuyle, 6 Barr. 250; Whittington *v.* Wright, 9 Geo. 23; Morland *v.* Bliss, 12 B. Mon. 255; Gottschalk *v.* De Santos, 12 La. An. 473.

The equitable rule that a man claiming an interest in property may not stand by and conceal his claim, when he sees another dealing with the property as his own, or as unincumbered, applies with peculiar force, if the person claiming title has in any way actively encouraged the parties to deal with each other,[1] * or has confirmed the party in the error into which he has fallen, or if he derives any benefit from the delusion so caused.[2]

In order to justify the application of the principle, it is indispensable that the party standing by should be fully apprised of his rights, and should by his conduct encourage the other party to alter his condition, and that the latter should act on the faith of the encouragement so held out.[3] † The principle

[1] Dyer *v.* Dyer, 2 Ch. Ca. 108; Draper *v.* Borlase, 2 Vern. 370; Ibbotson *v.* Rhodes, *ib.* 553; Brown *v.* Thorpe, 11 L. J. Ch. 73; Davies *v.* Davies, 6 Jur. N. S. 1322.

[2] Nicholson *v.* Hooper, 4 M. & C. 179.

[3] Dann *v.* Spurrier, 7 Ves. 230; Barnard *v.* Wallis, Cr. & Ph. 85; Marker *v.* Marker, 9 Ha. 16; Hooper *v.* Clark, 25 L. J. Ch. 467; Ramsden *v.* Dyson, L. R. 1 App. Ca. 129.

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* Folk *v.* Beidelman, 6 Watts, 339; Aills *v.* Graham, 6 Litt. 440; Blackwood *v.* Jones, 4 Jones' Eq. 54.

† Snelgrove *v.* Snelgrove, 4 Dessau. 274; Buckingham *v.* Smith, 10 Ohio, 288; Ringrow *v.* Warder, 6 B. Mon. 514; Whitaker *v.* Williams, 20 Ct. 98; Lewis *v.* San Antonio, 7 Tex. 288; Tilghman *v.* West, 8 Ired. Eq. 183; Dixfield *v.* Newton, 41 Me. 221; McAfferty *v.* Conover, 7 Ohio St. R. 99; Boggs *v.* Merced *et al.* 14 Cal. 279; Newman *v.* Edwards, 34 Penn. 32; Danforth *v.* Adams, 29 Ct. 107; Junction R. R. Co. *v.* Harpold, 19 Ind. 347; Tongue *v.* Nutwell, 17 Md. 212; Robinson *v.* Justice, 2 Penn. 19.

Where a party acting under a mistake of law or of facts, does acts which mislead the adverse party, he is estopped as well as if he was not acting under such mistake. Garner *v.* Bird, 57 Barb. 277; Barnes *v.* McKay, 7 Ind. 301; Tilton *v.* Nelson, 27 Barb. 595; Aills *v.* Graham, 6 Litt. 440; Skinning *v.* Neufville, 2 Dessau. 194; Strong *v.* Elsworth, 26 Vt. 366; Wells *v.* Pierce, 27 N. H. 503; Storrs *v.* Barker, 6 Johns. Ch. 166; M'Kelvey *v.* Truby, 4 W. & S. 323; Jackson *v.* Inabit, 2 Hill's Ch. 411; s. c. Riley's Ch. 9.

Positive acts stand upon a different footing from mere concealment; for there, a title may be postponed even without fraud, in accordance with an equitable principle of universal application, that where a loss must

does not apply in favor of a stranger who builds on land, knowing it to be the property of another, nor in favor of a lessee who expends moneys with the knowledge of his landlord on the improvement of the estate. If a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditures upon it. So, also, if a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope and expectation of an extended term or an allowance for it, then if such hope or expectation has not been created or encouraged by the landlord, the tenant has no equity to prevent the landlord from taking possession of the land and buildings when the tenancy is determined.[1] * Nor does the principle apply in favor of a man who is conscious of a defect in his title, and with such conviction in his mind expends money in improvements on the estate.[2] †

[1] Pilling *v.* Armitage, 12 Ves. 78; Clare Hall *v.* Harding, 6 Ha. 273; Duke of Beaufort *v.* Patrick, 17 Beav. 60; Hamer *v.* Tilsley, John. 487; O'Fay *v.* Burke, 8 Ir Ch. 226; Ramsden *v.* Dyson, L. R. 1 App. Ca. 129, *per* Lord Kingsdown. See Rennie *v.* Young, 2 D. & J. 142.

[2] Kenney *v.* Brown, 3 Ridg. 518.

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necessarily fall upon one of two innocent persons, it shall be borne by him whose act has occasioned it. Beaupland *v.* McKeen, 28 Penn. 124.

The excuse of ignorance does not apply where the misrepresentations that mislead another are made by a party who is consciously ignorant of the matter to which they relate at the very time that he professes a full knowledge of it. Preston *v.* Mann, 25 Ct. 118.

An express agreement recognizing an erroneous boundary will conclude a party where the other party, acting upon the faith of such agreement, has made expensive improvements, the benefit of which will be lost to him if the line is disturbed. Corkhill *v.* Landers, 44 Barb. 218; Wood *v.* McLellan, 48 Me 275; Combs *v.* Cooper, 5 Minn. 254.

* Ferris *v.* Coover, 10 Cal. 589; Odlin *v.* Gove, 41 N. H. 465; Baldwin *v.* Richman, 1 Stockt. 894; Patton *v.* McClare, 1 Mart. & Yerg. 333; Gray *v.* Bartlett, 20 Pick. 186.

† McCormick *v.* McMurtrie, 4 Watts, 192; Buckingham *v.* Smith, 10

A man who, with full knowledge of the real circumstances of the case, permits another, under a mistake, to execute a deed, whereby he incurs a liability, cannot be heard to say that he has contracted liability on the faith of the other being subject to the liability.[1]

The rule at law as to leave and license not being countermandable cannot, perhaps, as far as it goes, be distinguished from the equitable doctrine of acquiescence,[2] but leave and license executed may be set up at law, as giving a right and title, only in cases where moneys have been expended by a man upon his own land.[3] No right or title can be acquired to an easement, or other right over the land of another, although the license may have been executed, and moneys may have been expended upon the land of the licensee by his express permission. The license may be at any time countermanded at the will of the owner of the soil.[4] But in equity the doctrine of acquiescence applies as well where a man has been induced to

[1] Broughton *v.* Hutt, 3 D. & J. 501.

[2] Davies *v.* Marshall, 10 C. B. N. S. 711, *per* Willes, J.; but see Swaine *v.* Great Northern Railway Co, 9 Jur. N. S. 1196.

[3] Winter *v.* Brockwell, 8 East, 309; Hewlins *v.* Shipham, 5 B. & C. 221; Liggins *v.* Inge, 7 Bing. 682; Davies *v.* Marshall, 10 C. B. N. S. 711; Blood *v.* Keller, 11 Ir. C. L. 124.

[4] Wallis *v.* Harrison, 4 M. & W. 538; Wood *v.* Leadbitter, 13 M. & W. 838; Davies *v.* Marshall, 10 C. B. N. S. 711. See Fisher *v.* Moon, 11 L. T. N. S. 623; but see Blood *v.* Keller, 11 Ir. C. L. 124.

Ohio, 288; Hepburn *v.* McDowell, 17 S. & R. 383; Crest *v.* Jack, 3 Watts, 238.

One joint tenant cannot make improvements on the common property without the consent of the rest, and then claim to hold it until reimbursed a proportion of the moneys expended. Crest *v.* Jack, 3 Watts, 238.

The law imputes knowledge of every fact of which the exercise of ordinary diligence would have put a party in possession, and such an imputation of knowledge is sufficient to rebut the inference of a merely constructive fraud, which might otherwise be implied from the silence of the owner. Alexander *v.* Kerr, 2 Rawle, 83; Chew *v.* Caloitt, 1 Walk. 84, Knouff *v.* Thompson, 16 Penn. 357.

expend moneys on the land of another, as where the expenditure has been on his own land.[1]

The equitable doctrine with respect to the part performance of parol agreements is founded on the general doctrine of law as to misrepresentation. At law the express language of the Statute of Frauds prevails, and the doctrine as to the part performance of parol agreements has no place. But in equity it is a fraud in the eye of the court to set up the absence of an agreement, where possession has been given on the faith of an agreement. If a man has been permitted to take possession on the faith of an agreement, it is against equity that he should be treated as a trespasser, and turned out of possession, on the ground that there is no agreement. Where possession has been given on the faith of an agreement, a court of equity will, as far as possible, ascertain the terms of the agreement, and give effect to it.[2] Nothing, however, is part performance that does not put the party into a situation that it is a fraud upon him, if the agreement be not performed.[3] In order, too, that an act of part performance may have any operation whatsoever, it must be shown plainly what the terms of the agreement are, and it must clearly appear that the act of part performance relied on is properly referable to an agreement such as the one alleged and is not referable to another title.[4] The expenditure, for instance, by a tenant in possession on repairs, is referable to the title which he has in the estate, and cannot

[1] Duke of Devonshire *v.* Eglin, 14 Beav. 530; Duke of Beaufort *v.* Patrick, 17 Beav. 60; White *v.* Wakley, 26 Beav. 20; Laird *v.* Birkenhead Railway Co., John. 500; Fisher *v.* Moon, 11 L. T. N. S. 623.

[2] Mundy *v.* Jolliffe, 5 M. & C. 177; Wilson *v.* West Hartlepool Railway Co., 2 D. J. & S. 475. See Bond *v.* Hopkins, 1 Sch. & Lef. 413, 433; Morphett *v.* Jones, 1 Sw. 172; Surcombe *v.* Pinniger, 3 D. M. & G. 571; Great Northern Railway Co. *v.* Lancashire, &c., Railway Co., 1 Sm. & G. 81; Powell *v.* Lovegrove, 8 D. M. & G. 357; Pain *v.* Coombs, 1 D. & J. 34; Lillie *v.* Legh, 3 D. & J. 204; Lincoln *v.* Wright, 4 D. & J. 16; Stevens' Hospital *v.* Dyas, 15 Ir. Ch. 403.

[3] Clinan *v.* Cooke, 1 Sch. & Lef. 41.

[4] Fry on Specific Performance, 174. See Dale *v.* Hamilton, 5 Ha. 381; Lincoln *v.* Wright, 4 D. & J. 16; Price *v.* Salusburg, 32 Beav. 446; Lord *v.* Underdonck, 1 Sandf. Ch. (Amer.), 46; Smith *v.* Underdonck, *ib.* 579; Wolfe *v.* Frost, 4 Sandf. Ch. (Amer.), 72.

be deemed an act of part performance.[1] But the laying out of money by a tenant in possession, in pursuance of a parol agreement for a lease, or upon the faith of a specific engagement that possession should not be disturbed, is an act of part performance.[2] So, also, and upon the same principle, the possession of a tenant after the expiration of a lease, is not a part performance, for it is referable to the title he has;[3] but it is otherwise if the possession be referable to an agreement for renewal.[4] The mere payment of money is not part performance,[5] nor is marriage an act of part performance, but if one of the contracting parties agrees, as the consideration for a marriage, to do something more than marry, as to settle an estate, and in consideration of that promise the other party contracts to make a settlement, the settlement made by the one contracting party is a good act of part performance.[6]

The general doctrine of law with respect to misrepresentation applies to cases where a man, by his negligent conduct, puts it in the power of a third party to commit a fraud upon another. If a man, by neglect of some duty that is owing to another, or to the general public, of which he is one, leads him to believe in the existence of a certain state of facts, and the belief so induced is the proximate cause of leading him to do a certain act, whereby he is prejudiced, the former cannot be afterwards heard as against the latter to show at law that that state of facts did not exist.[7] The same principle obtains in

[1] Wills *v.* Stradling, 3 Ves. 378; Pilling *v.* Armitage, 12 Ves. 78; Savage *v.* Carroll, 1 B. & B. 265; Brennan *v.* Bolton, 2 Dr. & War. 349. See Ramsden *v.* Dyson, L. R. 1 App. Ca. 129.

[2] Wills *v.* Stradling, 3 Ves. 378; Mundy *v.* Jolliffe, 5 M. & C. 167; Sutherland *v.* Briggs, 1 Ha. 26; Shillibeer *v.* Jarvis, 8 D. M. & G. 79; Laird *v.* Birkenhead Railway Co., John 500; Nunn *v.* Fabian, L. R. 1 Ch. Ap. 35. See Ramsden *v.* Dyson, L. R. 1 App. Ca. 129.

[3] Wills *v.* Stradling, 3 Ves. 378; Lincoln *v.* Wright, 4 D. & J. 20.

[4] Dowell *v.* Dew, 1 Y. & C. C. C. 345.

[5] Clinan *v.* Cooke, 1 Sch. & Lef. 41.

[6] Hammersley *v.* De Biel, 12 Cl. & Fin. 45. See Warden *v.* Jones, 2 D. & J. 76; Caton *v.* Caton, L. R. 1 Ch. Ap. 137, 2 L. R. Ap. Ca. 127. See further on the subject of part performance, Fry on Specific Performance, 174—190; Sug. V. & P. 150—157; Dart. V. & P. 655—661.

[7] Swan *v.* North Australasian Co.,

equity. If a man, although he may be acting in the most entire good faith, is guilty of such a degree of neglect as to enable another so to deal with that which is his right, as to lead an innocent party to assume that he is dealing with his own, he creates an equity against himself in favor of the innocent party who has been so misled, and must bear the loss.[1] "It is a general principle of equity," said Turner, L. J., in Tayler *v.* Great Indian Peninsular Railway Company,[2] "that wherever one of two innocent parties must suffer by the acts of a third, he who has enabled the third party to occasion the loss must sustain it."[3] But to bring a case within the principle, it is necessary that the representation allowed to be conveyed to the mind of one of the two innocent parties, by the negligent conduct of the other, should be false, and that he should believe it to be true, and should not have the means which would enable a reasonable man to discover the falsehood,[4] and that the negligence should be in respect of some duty cast upon the person who is guilty of it, and should be in the transaction itself, and should be a proximate and necessary cause of the transaction. It is not sufficient that it should be only remotely connected with it.[5]

The application of the principle, and the determination of the better equity, as between two innocent parties, who have been defrauded by a third party, is often a matter of much nicety.[6] If there be anything in the transaction calculated to

2 H. & C. 182. See Bank of Ireland *v.* Trustees of Evans' Charities, 5 H. L. 409.

[1] Teasdale *v.* Teasdale, Sel. Ca. Ch. 59; Evans *v.* Bicknell, 6 Ves. 181; Vandeleur *v.* Blagrave, 17 L. J. Ch. 45; West *v.* Jones, 1 Sim. N. S. 205; Waldron *v.* Sloper, 1 Drew, 193; Perry Herrick *v.* Attwood, 2 D. & J. 21; Layard *v.* Maud, L. R. 4 Eq. 404.

[2] 4 D. & J. 559, 574.

[3] See Greenfield *v.* Edwards, 2 D. J. & S. 582.

[4] Vandeleur *v.* Blagrave, 17 L. J. Ch. 45. See Kennedy *v.* Green, 3 M. & K. 699.

[5] Swan *v.* North British Australasian Co., 2 H. & C. 182. See Trustees of Evans' Charity *v.* Bank of Ireland, 5 H. L. 389; Nicoll's Case, 3 D. & J. 387.

[6] See Frazer *v.* Jones, 5 Ha. 475, 17 L. J. Ch. 353; Jones *v.* Thomas, 11 W. R. 50.

excite suspicion, or to put one of the parties upon inquiry, and he abstains from inquiry, the consequences of his own neglect must fall upon him.[1] Where, for instance, an innocent party had accepted an instrument which, upon its very face, was devoid of legal validity, the court held that as between him and another innocent party, the loss must fall upon him.[2]

In cases where there is nothing to put either of the parties upon inquiry, the court, in determining the question upon which of two innocent parties the loss must fall, has regard to the relation, if any, between the parties, and to their respective rights and omissions. Any negligence or indiscretion on the part of the one, may give the other a better equity.[3] Where, for instance, a man having dealings with another, duly and formally executed a deed in respect of the dealings, and delivered the deed to the agent of the other party, without receiving the purchase-moneys, and the agent received the moneys from his principal and misappropriated them, it was held that the loss must fall on the former, inasmuch as he had, by his negligence in delivering the deed to the agent, put it into his power to commit the fraud.[4] A man who has permitted himself to be made a tool of by another, in whose hands he has left the deed, cannot set up as against a third party, who has acted fairly and honestly in the transaction, that he has been deceived.[5] Where, on the other hand, a man having dealings with another, in respect

[1] Kennedy *v.* Green, 3 M. & K. 699. See *infra*, NOTICE.

[2] Taylor *v.* Great Indian Peninsular Co., 4 D. & J. 559. See Cottam *v.* Eastern Counties Railway Co., 1 J. & H. 243; Donaldson *v.* Gillott, L. R. 3 Eq. 277.

[3] Vandeleur *v.* Blagrave, 6 Beav. 565, 17 L. J. Ch. 45; Hiorns *v.* Houlton, 16 Beav. 259; Waldron *v.* Sloper, 1 Drew, 193; Cottam *v.* Eastern Counties Railway Co. 1 J. & Ha. 243; Case *v.* James, 3 D. F. & J. 264; Spaight *v.* Cowne, 1 H. & M. 359; Dowle *v.* Saunders, 2 H. & M. 250.

[4] West *v.* Jones, 1 Sim. N. S. 208. See Young *v.* White, 7 Beav. 508; Young *v.* Guy, 8 Beav. 147; Griffin *v.* Clowes, 20 Beav. 61; Rushout *v.* Turner, 5 W. R. 670; Wrout *v.* Dawes, 25 Beav. 369; Smith *v.* Evans, 28 Beav. 62; Wall *v.* Cockerell, 3 D. F. & J. 737; 10 H. L. 229; Adsetts *v.* Hives, 33 Beav. 52.

[5] Greenfield *v.* Edwards, 2 D. J. & S. 596.

of which the same person acted as agent for both parties, delivered to the agent an instrument, reciting the payment of the purchase-moneys, but without the receipt for the moneys being signed, and the agent received the moneys in payment from the other party, but did not pay them over to the former, or inform him that they were in his hands, it was held that the latter, who had paid the moneys into the hands of the agent, must bear the loss.[1]

The question as to which of two innocent parties must bear the loss occasioned by the fraud of a third party, sometimes arises in cases where a banker has paid moneys upon a forged cheque. Payment on a forged cheque is not any payment at all as between the party paying and the person whose name is forged.[2] But cases may exist in which such payment may be made valid by reason of collateral matters. Where there has been negligence or want of due caution in the circumstances that were the immediate cause of the payment, on the part of the person whose name is forged, he cannot set up the invalidity of the document as against his bankers, who have been induced thereby to pay moneys upon it, if it appears that they have acted in the matter with reasonable caution.[3] In Young *v.* Grote,[4] for instance, the customer of a bank signed a cheque in blank, to be filled up by his wife, with whom he left it, and she filled it up with a sum of £50, written so inartificially that a servant was able to insert the words "three hundred" before the word "fifty," so as to deceive the bank without blame on their part. It was held that the loss must fall on the customer.

[1] Vandeleur *v.* Blagrave, 6 Beav. 565, 17 L. J. Ch 45. See Rushout *v.* Turner, 5 W. R. 670; Ogilvie *v.* Jeaffreson, 2 Giff. 353; Spaight *v.* Cowne, 1 H. & M. 359; Wall *v.* Cockerell, 10 H. L. 229; Adsetts *v.* Hives, 33 Beav. 52.

[2] Orr *v.* Union Bank of Scotland, 1 Macq. 513.

[3] *Ib.* 523; British Linen Co. *v.* Caledonian Insurance Co. 4 Macq. 114.

[4] 4 Bing. 253.

In cases arising between the owner of the legal estate, or a first mortgagee, and a person who claims an equity upon the estate, or the title deeds, the application of the principle differs from the rule which applies in ordinary cases. In order that the owner of the legal estate, or first mortgagee, should be postponed to a subsequent incumbrancer, it is not sufficient to make out a case of mere negligence. To have that effect, a case of gross negligence must be made out.[1] If a man, in taking the legal estate, makes no inquiry for the title deeds, but allows them to remain in the hands of the vendor or mortgagor, his conduct affords evidence of an amount of negligence sufficient to justify the court in imputing to him a knowledge of those facts which, by the use

[1] Peter *v.* Russell, 2 Vern. 726; Evans *v.* Bicknell, 6 Ves. 174, 191; Colyer *v.* Finch, 5 H. L. 905; Carter *v.* Carter, 3 K. & J. 646; Perry Herrick *v.* Attwood, 2 D. & J. 21. The distinction between mere negligence and gross negligence was recognized by the Roman lawyers. *Culpa levis*, in the language of the Roman law, is the want of that diligence which is taken by prudent, careful persons; *culpa lata* is the want of that diligence which might be expected even of a person of less than ordinary prudence. Lindl. on Jur. 131, *Culpa lata* was considered generally equivalent to *dolus*. *Lata culpa dolo comparatur.* Dig. 11, tit. 6, leg. 1, § 1. "*Lata culpa est nimia negligentia, id est non intelligere quod omnes intelligunt.*" Dig. Lib. 50, tit. 16, leg. 213. "*Si quis non ad eum modum quem nominum natura desiderat diligens est, fraude non caret.*" Dig. Lib. 16, tit. 3, leg. 32. "*Sensus est,*" adds a commentator, *ib.*, "*latam culpam duobus indiciis deprehendi. Primo si quis non ad eum modum faciat, quo omnes homines faciunt: altero, si quis non eodem modo in re aliena ac in suis rebus versetur; utrumque dolo proximum est. Levis est quotiis eandem in alienis quam in suis rebus diligentiam et fidem præstat, non tamen eam quam circumspectiores homines et diligentissimi adhibent: et, ut paucis dicam, levis culpa est consucta in rebus suis et alienis negligentia; lata est in suis diligentia, in alienis negligentia.*" If the fault is one which any man in his senses would have scrupled to commit, there is *lata culpa:* if the fault consists in falling short of the highest standard of carefulness to avoid injury that could be found; such, for instance, as the carefulness employed in the management of affairs by a person who would deserve to be called *bonus paterfamilias*, the *culpa* was *levis* or *levissima*. Or, again, it might consist in falling short of the care which the person guilty of the *culpa* was accustomed to bestow on his own affairs. *Lata culpa* was treated very much on the same footing as *dolus*, as there always seems something wilful in the extreme negligence, the *crassa negligentia* which characterized the *lata culpa.*—Sandars' Inst. p 477. When it is said by the Roman lawyers that negligence, heedlessness, or rashness is equivalent, in certain cases, to *dolus*, the meaning is, that, judging from the conduct of the party, it is impossible to determine whether he intended, or whether he was negligent, heedless, or rash; and that, such being the case, it shall be presumed that he intended, and his liability shall be adjudged accordingly, provided that the question arise in a civil action.—Austin's Lect. on Jur. vol. II, p. 107.

of ordinary diligence he must have discovered. So, also, gross negligence will be imputed to a man who, having parted with the title deeds for a reasonable purpose, allows them to remain out of his possession for an unreasonable time. But if a man, on taking the legal estate *bonâ fide*, inquires for the title deeds, and a reasonable explanation or excuse is given for their non-delivery, or if he parts with them for a reasonable purpose, and does not allow them to remain out of his hands without making reasonable inquiries for them, or using reasonable endeavors to get them back, gross negligence will not be imputed to him, although a fraud may be practised by means of them upon an innocent party.[1]

In cases, however, where the contest lies between parties having merely equitable interests, unaccompanied by the legal estate, an equitable mortgagee who either omits to get, or who having got the deeds, gives them up, and thereby arms the mortgagor with the means of dealing with the estate, as the absolute legal or equitable owner, free from any shadow of incumbrance or adverse equity, will be postponed to another equitable incumbrancer who has got possession of the deeds, and whose equity in other respects is of the same nature and quality.[2] In examining into the relative merits or equities of two parties having adverse equitable interests, the court directs its attention not only to the nature and conditions of their respective equitable interests, but to the circumstances of

[1] Peter *v.* Russell, 2 Vern. 726; Martinez *v.* Cooper, 2 Russ. 198; Farrow *v.* Rees, 4 Beav. 18; Stevens *v.* Stevens, 2 Coll. 20; Worthington *v.* Morgan, 16 Sim. 547; Hewitt *v.* Loosemore, 9 Ha. 449; Rayne *v.* Baker, 1 Giff. 246; Colyer *v.* Finch, 5 H. L. 905; Carter *v.* Carter, 3 K. & J. 646; Perry Herrick *v.* Attwood, 2 D. & J. 21; Hunt *v.* Elmes, 2 D. F. & J. 578; Hopgood *v.* Ernest, 3 D. J. & S. 116. See Allen *v.* Knight, 11 Jur. 527; Dowle *v.* Saunders, 2 H. & M. 242; but see Layard *v.* Maud, L. R. 4 Eq. 406, *per* Malins, V.-C.

[2] Allen *v.* Knight, 5 Ha. 272, 11 Jur. 527; Waldron *v.* Sloper, 1 Drew. 193; Rice *v.* Rice, 2 Drew. 83; Dowle *v.* Saunders, 2 H. & M. 242; Layard *v.* Maud, L. R. 4 Eq. 397.

their acquisition, and the whole conduct of each party with respect thereto.[1]

No priority can be acquired through the medium of a breach of duty.[2] Negligence will not be imputed to a man for leaving his title deeds in the hands of his solicitor[3], or delivering a transfer of shares and certificates to a broker for the purpose of registration[4]; nor will negligence be imputed to trustees for leaving documents of title in the hands of one of their number[5], or a corporation seal in the hands of their secretary.[6]

In the case of equitable interests in personal estate, or choses in action, a purchaser or other incumbrancer, who fails to give notice of his interest to the person in possession of the fund, will be postponed to an incumbrancer, though subsequent in date, who gives notice.[7] But this rule has no application whatever to real estate. As between equitable incumbrancers of real estate, he whose security is prior in date, has the better equity. He who takes the first security is entitled to priority over a person who takes a subsequent security, notwithstanding that the latter may have been beforehand in giving the party in possession of the estate notice of his security.[8] An equitable incumbrancer on real estate is not as against another equitable incumbrancer postponed by any absence of activity in asserting his legal right, except such as amounts to fraud.[9]

[1] Rice *v.* Rice, 2 Drew. 80.

[2] Cory *v.* Eyre, 1 D. J. & S. 149.

[3] *Ib.*, Bozon *v.* Williams, 3 Y. & J. 150.

[4] Donaldson *v.* Gillott, L. R. 3 Eq. 277.

[5] Cottam *v.* Eastern Counties Railway Co. 1 J. & H. 243. See Carter *v.* Carter, 3 K. & J. 647; Stackhouse *v.* Countess of Jersey, 1 J. & H. 721; Dodds *v.* Hills, 2 H. & M. 424.

[6] Bank of Ireland *v.* Trustees of Evans' Charities. 5 H. L. 409.

[7] Dearle *v.* Hall, 3 Russ. 1; Loveridge *v.* Cooper, *ib.* 30; Foster *v.* Blackstone, 1 M. & K. 297; Martin *v.* Sedgwick, 9 Beav. 333; Etty *v.* Bridges, 2 Y. & C. C. C. 486; Thompson *v.* Tomkins, 2 Dr. & Sm. 8.

[8] Jones *v.* Jones, 8 Sim. 642; Wiltshire *v.* Rabbits, 14 Sim. 76.

[9] Rooper *v.* Harrison, 2 K. & J. 103.

SECTION III.—FRAUD TO BE PRESUMED FROM THE INEQUALITY OF FOOTING OF THE PARTIES.—INADEQUACY OF CONSIDERATION.

Besides that kind of fraud which consists in misrepresentation, express or implied, there is another which will be presumed, when parties to a transaction do not stand upon the equal footing on which parties to a transaction should stand.[1] The general theory of the law, in regard to acts done and contracts made by parties affecting their rights and interests being that, in order to bind them there must be a free and full consent, and consent being an act of reason accompanied with deliberation, transactions, in which one of the parties is not as free and voluntary an agent as the other, or does not apprehend the meaning and effect of what he is doing, want the very qualities which are essential to the validity of all transactions.[2] In order that there should be consent, it is essential that the consent should be given with reflection and with knowledge, freely, without restraint or surprise. Fraud, therefore, whether consisting in misrepresentation, concealment, violence, duress, or constraint, will nullify consent.[3] It is upon this principle that when a person, who from his state of mind, age, weakness, or other peculiar circumstances, is incapable of exercising a free discretion, is induced by another to do any act, which may tend to the injury of himself or his representatives, that other shall not be allowed to derive any benefit from his improper conduct. The equitable rule is of universal application that where a man is not a free agent,

[1] Edwards *v.* Meyrick, 2 Ha. 68.
[2] Story's Eq. Jur. § 222.
[3] Toull. Cod. Civ. liv. 3, tit. 3, § 2, n. 38.

or is not equal to protecting himself, the court will protect him.[1] *

It is upon the general ground that there is a want of rational and deliberate consent that the contracts of idiots, lunatics, and other persons *non compotes mentis*, are generally deemed invalid by a court of equity. The mere fact, however, that a man is in a state of lunacy, or is even in confinement, will not *per se* induce the court to interfere, if it be distinctly

[1] Evans *v.* Llewellyn, 1 Cox, 340; Crowe *v.* Ballard, 1 Ves. Jr. 215; Casborne *v.* Barsham, 2 Beav. 76; Baker *v.* Monk, 10 Jur. N. S. 691; Williams *v.* Bayley, L. R. 1 App. Ca. 200.

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* Butler *v.* Haskell, 4 Dessau. 651; McCormick *v.* Malin, 5 Blackf. 503; Highberger *v.* Stiffler, 21 Md. 338; Hallett *v.* Collins, 10 How. 174; Bunch *v.* Hurst, 3 Dessau. 273; Brogden *v.* Walker, 2 H. & J. 285; Whelan *v.* Whelan, 3 Cow. 537; Keeble *v.* Cummins, 5 Hey. 43; King *v.* Cohon, 6 Yerg. 75; Mason *v.* Williams, 3 Munf. 126; Whipple *v.* McClure, 2 Root, 216; McDaniel *v.* Moorman, 1 Harp. Ch. 108; Rutherford *v.* Ruff, 4 Dessau. 350; James *v.* Langdon, 7 B. Mon. 193; Brice *v.* Brice, 5 Barb 533; Tracey *v.* Sackett, 1 Ohio St. R. 54; Cook *v.* Cole, 2 Halst. Ch. 522, 677; Craddock *v.* Cabiness, 1 Swan, 474; Kelly *v.* McGuire, 15 Ark. 555; Freeland *v.* Eldridge, 19 Mo. 325; Freeman *v.* Durggin, 2 Jones' Eq. 162; Hill *v.* McLaurin, 28 Miss. 288; Marshall *v.* Billingslea, 7 Ind. 250; Martin *v.* Martin, 35 Ala. 560; Franklin *v.* Ridenour, 5 Jones' Eq. 420.

By weakness of mind is meant a sort of mental imbecility approaching to the condition of one who is actually *non compos mentis* and analogous to childishness and dotage. Owing's case, 1 Bland, 370.

The only point of inquiry is in regard to the condition of the grantor's mind at the time of executing the instrument. Beckwith *v.* Butler, 1 Wash. (Va.) 224.

A court of equity will not impute fraud merely because one party is more intelligent than the other, although the bargain may turn out advantageously to the wiser party. Farnam *v.* Brooks, 9 Pick. 212; Arman *v.* Stout, 42 Penn 114; Thomas *v.* Shepperd, 2 McCord's Ch. 36; Mann *v.* Betterly, 21 Vt. 326.

Courts will not measure the degree of a man's understanding, but they will scrutinize all the transactions of persons of weak minds. Conant *v.* Jackson, 16 Vt. 335; Hadley *v.* Latimer, 3 Yerg. 537.

Great distress of mind and a proffer of assistance are circumstances that will be considered in determining whether a transaction is fraudulent. Dismukes *v.* Terry, Walk. 197; Wilson *v.* Watts, 9 Md. 356.

shown that the transaction was for his own benefit, that no coercion or imposition was used, and that he knew clearly what he was doing;[1] and so an executed contract, where parties have been dealing fairly and in ignorance of the lunacy, will not be set aside, if injustice would be done to the other side and the parties cannot be placed *in statu quo*, or in the position in which they stood before the transaction.[2] But this rule is not applicable to a case where the question is whether the deed of a lunatic altering the provisions of a settlement is invalid.[3]

The same rule prevails at law. To prove lunacy is not enough to avoid a contract. A contract entered into *bonâ fide* and in the ordinary course of business, is not void by reason of one of the parties having been at the time a lunatic.[4] To vitiate the contract, it must appear that the other party was aware of the fact of lunacy and took advantage of it.[5]

A party claiming under a deed, is not bound to prove the sanity of the person executing it. The burden of proof lies on the other side.[6]

Independently of that degree of imbecility which will render a man legally *non compos*, a conveyance may be impeached for mere weakness of intellect, provided it be coupled with other circumstances to show that the weakness, such as it is, has been taken advantage of by the other party; but the mere fact that a man is of weak understanding or is in intellectual capacity below the average of mankind, if there be no fraud, or no undue advantage be taken, is not of itself an

[1] Selby *v.* Jackson, 6 Beav. 192, 204. See Towart *v.* Sellers, 5 Dow, 231; Nelson *v.* Duncombe, 9 Beav. 211; Snook *v.* Watts, 11 Beav. 105; Stedman *v.* Hart, Kay, 607.

[2] Niell *v.* Morley, 9 Ves. 478, 482; Williams *v.* Wentworth, 5 Beav. 325; Jacobs *v.* Richards, 18 Beav. 300; Price *v.* Perrington, 3 Mac. & G. 486; Campbell *v.* Hooper, 3 Sm. & G. 153.

[3] Elliott *v.* Ince, 7 D. M. & G. 475.

[4] Molton *v.* Camroux, 4 Exch. 17.

[5] Beavan *v.* McDonnell, 10 Exch. 184.

[6] Jacobs *v* Richards, 18 Beav. 305.

adequate ground to set aside a transaction.[1]* Till a man be declared legally *non compos*, a deed executed by him is good.[2] The common law has not drawn any discriminating line by which to determine how great must be the imbecility of mind to render a transaction void and how much intellect is necessary to support it.[3] The boundaries between actual insanity and great mental weakness are so very narrow that the court must judge of this in each case upon facts and circumstances.[4]†

With regard to what shall constitute mental capacity, the rule in equity is the same as the rule at law. "There cannot," said Lord Hardwicke, in Bennett *v.* Wade,[5] "be two rules of judging in law and in equity upon the point of insanity;" and in Osmond *v.* Fitzroy,[6] the Master of the Rolls said there was

[1] Blachford *v.* Christian, 1 Knapp, 73; Ball *v.* Mannin, 3 Bligh, N. S. 1, 1 Dow. & Cl. 381.

[2] Osmond *v.* Fitzroy, 3 P. Wms. 129. See Garside *v.* Isherwood, 1 Bro. C. C. 559. Jacobs *v.* Richards, 18 Beav. 300. Comp. Evans *v.* Blood, 3 Bro P. C. 632.

[3] Jackson *v.* King, 4 Cow. (Amer.), 207; Manby *v.* Bewicke, 3 K. & J. 342.

[4] Bennett *v.* Wade, 9 Mod. 315. See White *v.* Small, 2 Ch. Ca. 103; Bell *v.* Howard, 9 Mod. 302; Hudson *v.* Beauchamp, 3 Bligh, 20 n.; Addis *v.* Campbell, 4 Beav. 401; Harrod *v.* Harrod, 1 K. & J. 7; Longmate *v.* Ledger, 2 Giff. 163; Clarke *v.* Sawyer, 3 Sandf. (Amer.), 357. See, as to want of assent arising from partial insanity, monomania, delusion, &c., &c., Dew *v.* Clarke, 5 Russ. 167; Waring *v.* Waring, 6 Moo. P. C. 341; Creagh *v.* Blood, 2 J. & L. 509. See also Steed *v.* Calley, 1 Keen, 620.

[5] 2 Atk. 327.

[6] 3 P. Wms. 130.

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* Wilson *v.* Watts, 9 Md. 356; Smith *v.* Beatty, 2 Ired. Eq. 456; Farnam *v.* Brooks, 9 Pick. 212; Simeon *v.* Wilson, 3 Edw. Ch. 36; Owing's Case, 1 Bland. 370; Clark *v.* Clark, 3 Hey, 23; Day *v.* Seeley, 17 Vt. 542; Whitehorn *v.* Hines, 1 Munf. 557; McCraw *v.* Davis, 2 Ired. Eq. 618; Buffalow *v.* Buffalow, 2 Dev. & Bat. Eq. 241; Young *v.* Stevens, 48 N. H. 133; Rippy *v.* Grant, 4 Ired. Eq. 443; Sprague *v.* Duel, 11 Paige, 480; Mace *v.* Boyer, 30 Penn. 99; Gass *v.* Mason, 4 Sneed, 497; Walton *v.* Worthington, 5 Sneed, 282; Davis *v* McNalley, 5 Sneed, 383.

A position in a court of justice founded upon what is in effect the stultification of the person who assumes that position is one to be considered with much diffidence. Eyre *v* Potter, 15 How. 43.

† Owing's Case, 1 Bland. 370; Harding *v.* Handy, 11 Wheat. 103; Young *v.* Stevens, 48 N. H. 133.

no such thing as an equitable incapacity, where there was a legal capacity.[1]

If a man be drunk to the extent of complete intoxication, so as to be no longer under the guidance of reason, or is in a state of excitement from excessive drinking, almost amounting to madness, any transaction which he may enter into while he is in that state is invalid.* If, however, the degree of intoxication falls short of such complete intoxication, he cannot have relief, unless it appear that he was drawn in to drink by the contrivance of the other party, and that an unfair advantage was taken of his situation.[2]† The rule at law on the subject agrees with the rule in equity.[3]

The rule is the same both at law and in equity with respect to the general incapacity of infants to enter into a binding contract. A man who enters into a contract during his minority is not either at law or in equity bound thereby after his majority on the mere ground that without any false assertion

[1] See Manby *v.* Bewicke, 3 K. & J. 342.

[2] Cory *v.* Cory, 1 Ves. 19; Cooke *v.* Clayworth, 18 Ves. 16; Say *v.* Barwick, 1 V. & B. 195; Butler *v.* Mulvihill, 1 Bligh, 137; Lightfoot *v.* Heron, 3 Y. & C. 586; Nagle *v.* Baylor, 3 Dr. & War. 60; Shaw *v.* Thackeray, 1 Sm. & G. 539; Wiltshire *v.* Marshall, 14 W. R. 602. See Addis *v.* Campbell, 4 Beav. 401; Martin *v.* Pycroft, 2 D. M. & G. 800; Gardner *v.* Gardner, 22 Wend. (Amer.), 526.

[3] Gore *v.* Gibson, 13 M. & W. 623, 626; Molton *v.* Camroux, 4 Exch. 17, 19; Hawkins *v.* Bone, 4 F. & F. 313.

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* Prentice *v.* Achorn, 2 Paige, 30; Wigglesworth *v.* Steers, 1 H. & M. 70; Hutchinson *v.* Brown, 1 Clark, 408; Crane *v.* Conklin, Saxton, 346; Morrison *v.* McLeod, 2 Dev. & Bat Ch. 221; Hutchinson *v.* Tindal, 2 Green's Ch. 357; Cruise *v.* Christopher, 5 Dana, 181; French *v.* French, 8 Ohio, 214; Galloway *v.* Witherspoon, 5 Ired. Eq. 128; Phillips *v.* Moore, 11 Mo. 600.

Habitual drunkenness, in the absence of undue advantage, is not sufficient ground for setting aside an instrument. Reinicker *v.* Smith, 2 H. & J. 421.

† White *v.* Cox, 3 Hey. 79; Belcher *v.* Belcher, 10 Yerg. 121; Hotchkiss *v.* Fortson, 7 Yerg. 67; Maxwell *v.* Pettinger, 2 Green's Ch. 150; Rodman *v.* Gilley, Saxton, 320; Whitesides *v.* Greenlee, 2 Dev. Ch. 152; Griffith *v.* Frederick Co. Bank, 6 G. & J. 424; Dunn *v.* Amoss, 14 Wis. 106.

on his part the other party believed him to be of age.[1] But if an infant by a false and fraudulent representation that he is of full age induces a man to enter into a contract with him, he is bound in equity,[2] although he is not liable at law.[3] * Infancy is not in equity an excuse for fraud. An infant who is old and cunning enough to contrive or carry on a fraud is bound in the same manner as if he were an adult.[4] It is not necessary that he should actively encourage fraud. It is enough if he be privy to it. If an infant knowing his rights stands by and seeing another in treaty for the purchase of his estate gives no notice of his title, he will not be permitted afterwards to avoid the purchase.[5] † An infant cannot be allowed by a court of equity to take advantage of his own fraud.[6] Where an infant had obtained from a creditor of his wife two promissory notes, in which he was indebted to him before marriage, on giving his bond to the creditor, he was ordered to give back the notes on his pleading infancy when sued on the bond.[7]

At law a married woman is under an absolute incapacity to bind herself by any engagement. Her separate existence is not contemplated, but is merged by the coverture in that of the husband. But in equity the case is wholly different. Her

[1] Stikeman *v.* Dawson, 1 Deg. & Sm. 105.

[2] Cory *v.* Gertcken, 2 Madd. 40; Wright *v.* Snowe, 2 Deg. & Sm. 321; *Ex-parte* Unity Bank, 3 D. & J. 63; Hannah *v.* Hodgson, 30 Beav. 23. Comp. *Ex-parte* Taylor, 8 D. M. & G. 254; Nelson *v.* Stocker, 4 D. & J. 458; but see Bartlett *v.* Wells, 1 B. & S. 836.

[3] Johnson *v.* Pye, 1 Sid. 258, 1 Keb. 913; Liverpool Adelphi Association *v.* Fairhurst, 9 Exch. 422; Bartlett *v.* Wells, 1 B. & S. 836.

[4] Watts *v.* Cresswell, 9 Vin. Ab. 415: Evroy *v.* Nicholas, 2 Eq. Ca. Ab. 489; Arnot *v.* Biscoe, 1 Ves. 95; *per* Lord Hardwicke. Beckett *v.* Cordley, 1 Bro. C. C. 358; but see Saunderson *v.* Marr, 1 H. Bl. 75.

[5] Savage *v.* Foster, 9 Mod. 37.

[6] Clarke *v.* Cobley, 2 Cox, 173.

[7] *Ib.* See Jones *v.* Kearney, 1 Dr. & War. 166.

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* Brown *v.* McCune, 5 Sandf. 224; Conroe *v.* Birdsall, 1 Johns. 127; Burley *v.* Russell, 10 N. H. 184; Stoolfoos *v.* Jenkins, 12 S. & R. 399.

† Hunter *v.* Foster, 4 Humph. 211; Hall *v.* Timmons, 2 Rich. Eq. 120; Whittington *v.* Wright, 9 Geo. 23; Barham *v.* Tuberville, 1 Swan, 437.

separate existence, both as regards her liabilities and her rights, is acknowledged in equity to the extent of the property which she enjoys for her separate use. In respect of such property she is capable of disposition and of doing other acts, as if she were a *feme sole*.[1] In respect of property not settled to her separate use, a married woman cannot bind herself in equity in matter of contract any more than she can at law, but coverture is no excuse in equity for a fraud.[2] * The acquies-

[1] Murray *v.* Barlee, 3 M. & K. 220; Vaughan *v.* Vanderstegen, 2 Drew. 379; Johnson *v.* Gallagher, 3 D. F. & J. 494.

[2] Savage *v.* Foster, 9 Mod. 37; Evans *v.* Bicknell, 6 Ves. 181; *per* Lord Eldon, Vaughan *v.* Vanderstegen, 2 Drew. 379.

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* Sexton *v.* Wheaton, 8 Wheat. 229; Hunter *v.* Foster, 4 Humph. 211; Cravens *v.* Booth, 8 Tex. 243; Bailey *v.* Trammel, 27 Tex. 317; Bein *v.* Heath, 6 How. (Miss.) 238; Couch *v.* Sutton, 1 Grant, 114.

A married woman can not be made personally liable for a fraud committed by her, even in respect to the sale of her separate estate. Curd *v.* Dodd, 6 Bush, 681.

The contract of a married woman is not made valid by the fact that she represented herself to be single at the time she gave it, and thereby obtained the consideration upon which it was given. Keen *v.* Coleman, 39 Penn. 299.

An action will not lie against a husband and his wife for her false representation that she was a *feme sole* at the time of executing a contract, and obtaining the consideration therefor. Keen *v.* Hartman, 48 Penn. 497.

Although a married woman may know that her husband is obtaining credit on the faith of her property, she will not be made responsible because of her silence. Bank of United States *v.* Lee, 13 Pet. 107; Hunter *v.* Foster, 4 Humph. 211.

A married woman is not estopped from asserting her claim to property on account of a fraud committed by her husband, unless it is further shown that she participated in his deceitful conduct. Gatling *v.* Rodman, 6 Ind. 289.

The doctrine of estoppel by mere omission to assert one's rights does not apply to the wife when her husband makes an unauthorized use of her property in her presence. Drake *v.* Glover, 30 Ala. 382; McIntosh *v.* Smith, 2 La. An. 756; Palmer *v.* Cross, 1 Smed. & Mar. 48.

Positive acts of encouragement that sometimes operate to estop one *sui generis*, will not affect one under a legal disability. Glidden *v.* Strippler, 52 Penn. 400.

cence however of a married woman in a transaction will not bind her, if the person with whom the transaction was entered into knew that she was a married woman.[1] *

The principle which vitiates a contract with an incapacitated person has been extended in equity to cases where from the peculiar relation which subsists between the parties, or from the influence which the one party has acquired over the other, the freedom of action which is essential to the validity of all transactions is overcome, and the equal footing on which parties to a transaction should stand is destroyed.[2]

If the relation between the parties is one of a fiduciary nature, transactions between them are watched by a court of equity with more than ordinary jealousy. The duty of a person who fills a fiduciary position being to protect the interests which are confided to his care, he may not avail himself of the influence which his position gives him for the purposes of his own benefit, and to the prejudice of those interests which he is bound to protect. It is a rule of equity that no man can be permitted to take a benefit where he has a duty to perform which is inconsistent with his acceptance of the benefit.[3] Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by the one and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the

[1] Nicholl *v.* Jones, 36 L. J. Ch. 554.
[2] See Casborne v. Barsham, 2 Beav. 76; Edwards *v.* Meyrick, 2 Ha. 60; Longmate *v.* Ledger, 2 Giff. 157; Barrett *v.* Hartley, L. R. 2 Eq. 789.
[3] Robinson *v.* Pett, 3 P. Wms. 249.

* Wilks *v.* Fitzpatrick, 1 Humph. 54; Glidden *v.* Strippler, 52 Penn. 400.

transaction could not have been impeached if no such confidential relation had subsisted.[1]

The rule of equity which prohibits a man, who fills a position of a fiduciary character, from taking a benefit from the person towards whom he stands in such a relation, stands upon a motive of general public policy, irrespective of the particular circumstances of the case. The rule is founded on considerations as to the difficulty which must, from the condition of the parties, generally exist, of obtaining positive evidence as to the fairness of transactions which are peculiarly open to fraud and undue influence. The policy of the rule is to shut the door against temptation.[2]

The rule does not, however, go the length of avoiding all transactions between parties standing in a fiduciary relation, and those toward whom they stand in such relation. All that a court of equity requires is, that the confidence which has been reposed be not betrayed. A transaction between them will be supported, if it can be shown to the satisfaction of the court that the parties were, notwithstanding the relation, substantially at arms' length and on an equal footing, and that nothing has happened which might not have happened, had no such relation existed. The burden of proof lies, in all cases, upon the party who fills the position of active confidence, to show that the transaction has been fair. If it can be shown to the satisfaction of the court that the other party had competent and disinterested or independent advice, or that he performed the act or entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of

[1] Tate *v.* Williamson, L. R. 2 Ch. App. 61.

[2] Herne *v.* Meeres, 1 Vern. 465; Aylliffe *v.* Murray, 2 Atk. 59; Robinson *v.* Pett, 3 P. Wms. 251; Benson *v.* Heathorn, 1 Y. & C. C. C. 342; Van Epps *v.* Van Epps, 9 Paige (Amer.), 241; Aberdeen Railway Co. *v.* Blaikie, 1 Macq. 461.

the power of influence to which the relation gave rise, the transaction will be supported.[1] A man standing in a fiduciary relation, if dealing with the confiding party, is bound to communicate all the information he has acquired respecting the property, the subject of the transaction, which it was material for him to know, in order to enable him to judge of the value of the property.[2]

The principles which govern the case of dealings of persons standing in a fiduciary relation apply to the case of persons who clothe themselves with a character which brings them within the range of the principle,[3] or who take instruments, securities or moneys with notice that they have been obtained by a person filling a position of a fiduciary character from a person towards whom he stands in such relation.[4]

In judging of the validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is, whether the person conferring a benefit had competent and independent advice. The age or capacity of the person conferring the benefit, and the nature of the benefit, are of little importance in such cases. They are important only where no such confidential relation exists.[5] The general principle, however, as to the incapacity of a person who stands in a fiduciary relation to take a benefit from the party towards whom he stands in such a relation,

[1] Gibson *v.* Jeyes, 6 Ves. 278; Giddings *v.* Giddings, 3 Russ. 241; Naylor *v.* Winch, 2 L. J. Ch. 135, 7 L. J. Ch. 6; Hunter *v.* Atkins, 3 M. & K. 113; Casborne *v.* Barsham, 2 Beav. 79; Tanner *v.* Elworthy, 4 Beav. 487; Greenlaw *v.* King, 10 L. J. Ch. 129; Edwards *v.* Meyrick, 2 Ha. 60; Waters *v.* Bailey, 2 Y. & C. C. C. 219; Knight *v.* Marjoribanks, 2 H. & Tw. 316; Billage *v.* Southee, 9 Ha. 540; Hoghton *v.* Hoghton, 15 Beav. 288; Allfrey *v.* Allfrey, 1 Mac. & G. 99; Smith *v.* Kay, 7 H. L. 750; Rhodes *v.* Bate, L. R. 1 Ch. App. 252; Tate *v.* Williamson, L. R. 2 Ch. App. 55.

[2] *Ib.*

[3] Tate *v.* Williamson, L. R. 2 Ch. App. 55.

[4] Ardglasse v. Pitt, 1 Vern. 238; Molony *v.* Kernan, 2 Dr. & War. 31; Espey *v.* Lake, 10 Ha. 260; Bardoe *v.* Dawson, 34 Beav. 603; Rolfe *v.* Gregory, 34 L. J. Ch. 275; Wyse *v.* Lambert, 16 Ir. Ch. 379. Comp. Rhodes *v.* Bate, L. R. 1 Ch. App. 260.

[5] Rhodes *v.* Bate, L. R. 1 Ch. App. 252.

admits of some limitation. A mere trifling gift to a person standing in a confidential relation, or a mere trifling liability incurred in favor of such person, cannot stand in the same position as a gift of a man's whole property, or a liability involving it, would stand in. In such cases the court will not interfere to set them aside upon the mere fact of a confidential relation, and the absence of proof of competent and independent advice. The court requires, before it will undo the benefit conferred, some proof not merely of influence derived from the relation, but of *mala fides*, or of undue or unfair exercise of the influence.[1]

After the termination of the fiduciary relation, it is open to the parties to deal on the same terms as strangers;[2] but if a relation of confidence be once established, either some positive act or some complete act of abandonment must be shown in order to determine it. The mere fact that the relation is not called into existence is not sufficient of itself to determine it.[3] If the confidential relation between the parties has not terminated at the commencement of the negotiation, the principles which govern the case of dealings between parties standing in a fiduciary relation continue to operate.[4] Although, indeed, the confidential employment may have ceased, the disability will continue so long as the reasons on which it is founded continue to operate.[5] A man, for instance, who has in the course of a fiduciary employment acquired some peculiar knowledge as to the property of his employer, cannot, after the cessation of the relation, use the knowledge so acquired for his own benefit, and to the prejudice of the other.[6] But although a person may have

[1] Rhodes *v.* Bate, L. R. 1 Ch. App. 252. See Beasley *v.* Magrath, 2 Sch. & Lef. 35.
[2] Tate *v.* Williamson, L. R. 2 Ch. App. 65; see Beaden *v.* King, 9 Ha. 532.
[3] Rhodes *v.* Bate, L. R. 1 Ch. App. 260.
[4] Tate *v.* Williamson, L. R. 2 Ch. App. 65,
[5] Carter *v.* Palmer, 8 Cl. & Fin. 657.
[6] *Ib.*; Holman *v.* Loynes, 4 D. M. & G. 270.

been employed or consulted on one occasion, this will not of itself constitute a confidential relation in respect of a subsequent transaction, occurring at a future and somewhat distant time.[1]

A common instance of the application of the rule that a man who fills a position of a fiduciary character cannot derive a benefit from the person towards whom he stands in such relation, is in the case of actual trustees. It is the duty of a trustee to use his best exertions for the advantage of the *cestui que trust.* He may not place himself in a situation in which his interests will come into conflict with that which his duty requires him to do. Any personal benefit which he may gain by availing himself of his fiduciary character must be acquired by a dereliction of duty, and will enure for the benefit of the trust estate.[2] * There is no more sacred

[1] Rhodes *v.* Bate, L. R. 1 Ch. App. 259.

[2] Holt *v.* Holt, 1 Ch. Ca. 190; *Ex-parte* Lacey, 6 Ves. 625; *Ex-parte* James, 8 Ves. 337, 344; D'Albiac *v.* D'Albiac, 16 Ves. 123; Hamilton *v.* Wright, 9 Cl. & Fin. 111; Broughton *v.* Broughton, 5 D. M. & G. 164; Vaughton *v.* Noble, 30 Beav. 34; Crosskill *v.* Bower, 32 Beav. 86. A lease obtained by a trustee or executor in his own name, even in the absence of fraud, and upon the refusal of the lessor to grant a new lease to the *cestui que trust,* shall be held upon trust for the person entitled to the old lease. Keech *v.* Sandford, Sel. Ca. Ch. 61; White *v.* Tudor, L. C. vol. I, p. 40.

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* Barney *v.* Saunders, 16 How. 535; Mitchell *v.* Moore, 6 Bush, 659; Van Epps *v.* Van Epps, 9 Paige, 237; Brinkerhof *v.* Brown, 4 Johns. Ch. 693; Matter of Oakley, 2 Edw. Ch. 478; Myers *v.* Myers, 2 McCord's Ch. 214; Jamison *v.* Glascock, 29 Me. 191.

All transactions relating to the trust estate enure to the benefit of the *cestui que trust.* Freeman *v.* Harwood, 49 Me. 195; Jewett *v.* Miller, 10 N. Y. 402; Brantly *v.* Key, 5 Jones' Eq. 332; Paige *v.* Naglee, 6 Cal. 241; Lennox *v.* Noterebe, 1 Hemp. 251; Spindler *v.* Atkinson, 3 Md. 409; Bill *v.* Webb, 2 Gill, 163; Callis *v.* Ridout, 7 G. & J. 1; Crutchfield *v.* Haynes, 14 Ala. 49; Green *v.* Winter, 1 Johns. Ch. 27; Hauley *v.* Marcius, 7 Johns. Ch. 174; Keaton *v.* Cobbs, 1 Dev. Ch. 439; Boyd *v.* Hawkins, 2 Dev. Ch. 195; M'Clanahan *v.* Henderson, 2 A. K. Marsh. 388; Chapin *v.* Weed, 1 Clarke, 464; Slade *v.* Van Vechten, 11 Paige, 21.

A purchase of the trust property is valid as to all persons except the *cestui que trust.* Wilson *v.* Troup, 2 Cow. 195; Painter *v.* Henderson, 7

rule of equity than that a trustee cannot so execute a trust as

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Barr, 48; McKinley *v.* Irvine, 13 Ala. 631; Baldwin *v.* Allison, 4 Minn. 25; Rice *v.* Clighorn, 20 Ind. 80.

A trustee can not avoid his purchase when the *cestui que trust* is satisfied. He can only file a bill calling upon the *cestui que trust* to confirm or avoid the sale. McClure *v.* Miller, Bailey's Ch. 107; Williams *v.* Marshall, 4 G. & J. 376; Huff *v.* Earl, 3 Ind. 306.

The option of the *cestui que trust* to follow the trust fund into a new investment, or to hold the trustee personally liable for a breach of the trust, belongs to him exclusively, and it is not in the power of the trustee to deprive him of it by a repurchase of the trust property. Oliver *v.* Piatt, 3 How. 333.

A sale of the trust property to a corporation, in which the trustee has a large interest, is voidable. Robbins *v.* Butler, 24 Ill. 387.

By claiming the proceeds, the *cestui que trust* confirms the sale. Pierce *v.* Nesbit, 1 Hill's Ch. 445.

In considering the capacity of a trustee to purchase the property of his *cestui que trust*, the authorities may be regarded under two classifications: 1st. Where a trustee buys or contracts with himself, or several trustees of which he is one, or a board of trustees. 2d. Where the dealing of the trustee is with a *cestui que trust*, who is *sui juris* and competent to deal independently of the trustee in respect to the trust estate. The distinction between the two classes of cases consists in this: that, in the first, the contract is voidable absolutely at the instance of the *cestui que trust*, without regard to its fairness; whilst, in the second, although the presumptions of law are against the contract, yet permission is given to the trustee to show the perfect *bonâ fides* of the transaction, and circumstances relieving it from the censure of the law. This is a distinction recognized generally, but not universally. Some of the cases insist, with great earnestness, that the governing principle ought to be, and is, the same in both classes. Hoffman *v.* Steam Coal Co. *v.* Cumberland Coal & Iron Co. 16 Md. 456; Cumberland Coal Co. *v.* Sherman, 30 Barb. 533.

The doctrine does not apply to the relation of principal and surety. Blow *v.* Maynard, 2 Leigh, 29.

While, in cases of pure trust, where exclusive jurisdiction is in equity, resort must be had to that tribunal for relief; and sometimes, in cases of *quasi* trust, that court will grant relief where there are special circumstances requiring it; yet, where the relation is a legal relation, and its rights and duties are defined by law, the remedies for the violation of such duties are ordinarily at law. Md. Fire Ins. Co. *v.* Dalrymple, 25 Md. 242.

to have the least benefit from it himself.[1]* The restraint on any personal benefit to the trustee is not confined to his dealings with the estate, but extends to remuneration for services, and prevents him from receiving anything beyond the payment of his expenses, unless there be an express stipulation to the contrary.[2] There may be cases in which the court will establish an agreement made with a trustee for a certain allowance beyond the term of his trust, but the court will be extremely cautious and wary in doing so. The court looks upon trusts as honorary, and a burden on the honor and conscience of the party, and not as taken with mercenary motives.[3] †

But there is no rule which incapacitates a trustee from dealing with the *cestui que trust* in respect of the trust estate. A trustee for sale may purchase the trust estate, if the *cestui que trust* fully and clearly understands with whom he is dealing, and makes no objection to the transaction, and the trustee fairly and honestly discloses all that he knows respecting the property, and gives a just and fair price, and does not seek to

[1] Forbes *v.* Ross, 2 Cox, 116.

[2] Robinson *v.* Pett, 3 P. Wms. 249; Moore *v.* Frowd, 3 M. & C. 46; Bainbrigge *v.* Blair, 8 Beav. 588; Broughton *v.* Broughton, 5 D. M. & G. 160; Harbin *v.* Darby, 28 Beav. 325; Crosskill *v.* Bower, 32 Beav. 86; Barrett *v.* Hartley, L. R. 2 Eq. 789.

[3] Ayliffe *v.* Murray, 2 Atk. 59.

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* Michoud *v.* Girod, 4 How. 503; Bank of Orleans *v.* Torrey, 7 Hill, 260; Conyer *v.* Ring, 11 Barb. 356; Murray *v.* Vanderbilt, 39 Barb. 140; Sloo *v.* Law, 3 Blatch. 459.

† A different rule prevails generally, if not universally, in this country. Here it is considered just and reasonable that a trustee should receive a fair compensation for his services, and, in most cases, it is gauged by a certain percentage on the amount of the estate. But a trustee who has acted fraudulently and dishonestly is not entitled to the same compensation as he who has acted uprightly; and there may be cases where negligence and want of care may amount to want of good faith. Barney *v.* Saunders, 16 How. 535.

secure surreptitiously any advantage for himself.[1]* But the transaction becomes impeachable, if there is any secret or underhand dealing on the part of the trustee. However fair it may be in other respects, the transaction cannot be supported, if the *cestui que trust* does not clearly and distinctly understand that he is dealing with the trustee. A trustee cannot, under any circumstances, be allowed to deal with himself on behalf of the *cestui que trust* surreptitiously and without his knowledge and assent. It is immaterial that he may take no advantage from the bargain. It may be that the terms on which he attempts to deal with the trust estate are as good as could have been obtained from any other quarter. They may even be better, but so inflexible is the rule, that no inquiry can be made as to the fairness or unfairness of the transaction. It is enough that the act has a tendency to interfere

[1] Ayliffe *v.* Murray, 2 Atk. 59; Clarke *v.* Swaile, 2 ed. 134; *Ex-parte* Lacey, 6 Ves. 626; *Ex-parte* James, 8 Ves. 348; Coles *v.* Trecothick, 9 Ves. 246; *Ex-parte* Bennett, 10 Ves. 381; Randall *v.* Errington, *ib.* 422; Morse *v.* Royal, 12 Ves. 355; Downes *v.* Grazebrook, 3 Mer. 208; Knight *v.* Marjoribanks, 2 Mac. & G. 10; *re* M'Kenna, 13 Ir. Ch. 239; Luff *v.* Lord, 11 Jur. N. S. 50; Dover *v.* Buck, *ib.* 580

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* Richardson *v.* Spencer, 18 B. Mon. 450; Sallee *v.* Chandler, 26 Mo. 124; Baxter *v.* Coston, 1 Busbee's Eq. 262; Kennedy *v.* Kennedy, 2 Ala. 571; Field *v.* Arrowsmith, 3 Humph 442; Villines *v.* Norfleet, 2 Dev. Ch. 167; Marshall *v.* Stephens, 8 Humph. 159; Bryan *v.* Duncan, 11 Geo. 67.

A trustee cannot become a purchaser of the trust estate. He cannot be both vendor and vendee. He cannot represent in himself two opposite and conflicting interests. Wormley *v.* Wormley, 8 Wheat. 421; Caldwell *v.* Taggart, 4 Pet. 190; Hunt *v.* Bass. 2 Dev. Eq. 292; Quarles *v.* Lacey, 4 Munf 251; De Cater *v.* Lee Roy de Chaumont, 3 Paige, 178; Child *v.* Brener, 4 Paige, 309; Campbell *v.* Johnson, 1 Sandf. Ch. 148; Johnson *v.* Bennett, 39 Barb. 237; Charles *v.* Dubose, 29 Ala. 367; Mason *v.* Martin, 4 Md. 124; Wasson *v.* English, 13 Md. 176; Armstrong *v.* Campbell, 3 Yerg. 201; McGinn *v.* Shaeffer, 7 Watts, 412; Mattheus *v.* Dezaud, 3 Dessau. 24; Thorp *v.* McCullum, 1 Gilman, 614.

A sale by a trustee to his *cestui que trust* stands on the same footing as a purchase by a trustee from his *cestui que trust.* McCarty *v.* Bee, 1 McCord's Ch. 383.

with the duty of protecting the trust estate which the trustee has taken upon himself to perform. The policy of the rule is to shut the door against temptation. It makes no matter whether the transaction relates to real estate, or personalty, or mercantile matters, for the disability arises not from the subject matter, but from the obligation under which a trustee lies to do his utmost for the *cestui que trust.*[1] * It makes no difference in the application of the principle that the sale was by public auction,[2] † or that the purchase was made through another person,[3] ‡ or that the purchase was made from a co-trustee,[4] § or that the trustee may have purchased as agent for another person,[5] ‖ or that a third person may, by previous

[1] Fox *v.* Macreth, 2 Bro. C. C. 400, 2 Cox, 320, 4 Bro. P. C. 258; *Ex-parte* Lacey, 6 Ves. 627; *Ex-parte* James, 8 Ves. 348; *Ex-parte* Bennett, 10 Ves. 394; Randall *v.* Errington, *ib.* 423; Att.-Gen. *v.* Earl of Clarendon, 17 Ves. 500; Gregory *v.* Gregory, Coop. 201; Woodhouse *v.* Meredith, 1 J. & W. 222; Baker *v.* Carter, 1 Y. & C. 250; Grover *v.* Hugell, 3 Russ. 428; Bailey *v.* Watkins, cit. 6 Bligh, 275; *re* Bloye's Trust, 1 Mac. & G. 490, affd. as Lewis *v.* Hillman, 3 H. L. 607; Knight *v.* Marjoribanks, 2 Mac. & G. 12; Hamilton *v.* Wright, 9 Cl. & Fin. 111; Ingle *v.* Richards, 6 Jur. N. S. 1178; Popham *v.* Exham, 10 Ir. Ch. 440; Aberdeen Railway Co. *v.* Blaikie, 1 Macq. 461; Parkinson *v.* Hanbury, 2 D. J. & S. 450; Ridley *v.* Ridley, 34 L. J. Ch. 463; Franks *v.* Bollans, 37 L. J. Ch. 155.

[2] Campbell *v.* Walker, 5 Ves. 678; *Ex-parte* James, 8 Ves. 348; *Ex-parte* Bennett, 10 Ves. 393; Sanderson *v.* Walker, 13 Ves. 602; York Buildings Co. *v.* M'Kenzie, 8 Bro. P. C. 42, 3 Pat. Sc. Ap. 378; Bailey *v.* Watkins, cit. 6 Bligh, 275; Downes *v.* Grazebrook, 3 Mer. 207; Grover *v.* Hugell, 3 Russ. 428; Lawrence *v.* Galsworthy, 3 Jur. N. S. 1049; Adams *v.* Sworder, 2 D. J. & S. 44.

[3] Sanderson *v.* Walker, 13 Ves. 602; Adams *v.* Sworder, 2 D. J. & S. 44.

[4] Hall *v.* Noyes, cit. 3 Ves. 748, 3 Bro. C. C. 483; Whichcote *v.* Lawrence, 3 Ves. 740.

[5] *Ex-parte* Bennett, 10 Ves. 381, 400; Gregory *v.* Gregory, Coop. 201; *Ex-parte* Grylls, 2 Dea. & Ch. 290.

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* Michoud *v.* Girod, 4 How. 503; Narcissa *v.* Wathan, 2 B. Mon. 241; Ringgold *v.* Ringgold, 1 H. & J. 11; Schwartz *v.* Wendell, Walk. Ch. 267.

† Michoud *v.* Girod, 4 How. 503; Davoe *v.* Fanning, 2 Johns. Ch. 252; Bellamy *v.* Bellamy, 6 Fla. 62.

‡ Michoud *v.* Girod, 4 How, 503; Davoe *v.* Fanning, 2 Johns. Ch. 252; Beeson *v.* Beeson, 9 Barr, 279; Dorsey *v.* Dorsey, 3 H. & J. 410.

§ Cumberland Coal Co. *v.* Sherman, 30 Barb. 533; Ringgold *v.* Ringgold, 1 H. & J. 11.

‖ Hawley *v.* Cramer, 4 Cow. 717; North Balto Building Association *v.* Caldwell, 25 Md. 420.

arrangement with the trustee, have been the purchaser in trust for the separate use and benefit of the wife of the trustee.[1]

The application of the principle is, however, limited to dealings with the trust estate. In all matters unconnected with the subject of the trust, the parties are fully competent with each other as strangers.[2]

Nor will the principle operate after the relation of trustee and *cestui que trust* is clearly dissolved, but a man who has been a trustee cannot, after the termination of the relation, be allowed to avail himself for his own benefit, and to the prejudice of the party for whom he has been trustee, of any information which he may have acquired during the existence of the relation.[3] Subject to this limitation, a man who has acted in a fiduciary character may, on divesting or discharging himself of the trust, purchase the property in respect of which he has filled a fiduciary position.[4]* If a man cannot by an act of his own discharge himself of the trust so as to enable him to purchase, the court will, under particular circumstances, divest him of the character and enable him to purchase.[5] If

[1] Davoe *v.* Fanning, 2 Johns. Ch. (Amer.), 252.

[2] Knight *v.* Marjoribanks, 2 Mac. & G. 12, 2 H. & Tw. 308.

[3] *Ex-parte* Lacey, 6 Ves. 627; Coles *v.* Trecothick, 9 Ves. 246; *Ex-parte* Bennett, 10 Ves. 394; Morse *v.* Royal, 12 Ves. 373. See Hamilton *v.* Wright, 9 Cl. & Finn. 111; Holman *v.* Loynes, 4 D. M. & G. 270.

[4] *Ex-parte* James, 8 Ves. 337; Sanderson *v.* Walker, 13 Ves. 601; Downes *v.* Grazebrook, 3 Mer. 200; Bartholemew *v.* Leech, 7 Watts (Amer.), 472. See Stacey *v.* Elph. 1 M. & K. 195; Austin *v.* Chambers, 6 Cl. & Fin. 1. The expression "shaking off" the character of trustee, or "dissolving the relation" of trustee, used in some of the cases, does not seem to amount to more than that the transaction takes place with the consent of the parties beneficially interested. *Ex-parte* James, 8 Ves. 352; Coles *v.* Trecothick, 9 Ves. 234, 246; Morse *v.* Royal, 12 Ves. 373; Downes *v.* Grazebrook, 3 Mer. 208; Chalmer *v.* Bradley, 1 J. & W. 68. In Austin *v.* Chambers, 6 Cl. & Fin. 1, where it was said that a man might, on shaking off the character of a trustee, purchase the trust estate, the solicitor was not employed in the sale by his client, and was himself a judgment creditor. A trustee cannot be allowed to purchase the trust estate by his retirement from the trust with that object in view. Spring *v.* Pride, 12 W. R. 510.

[5] Campbell *v.* Walker, 5 Ves. 681. See *Ex-parte* James, 8 Ves. 348; San-

* Kearney *v.* Taylor, 15 How. 494; Pries *v.* Evans, 26 Mo. 30.

the trust property is taken entirely out of a man's hands, and all his authority over it put an end to by the interposition and act of law, as in the case of a sale by execution, there is no reason why he should not be able to purchase. The principle upon which a trustee is debarred from purchasing the trust estate does not apply to such a case.[1] The assignee of an insolvent debtor, for instance, may purchase the debtor's estate when sold by the sheriff.[2] So also a creditor taking out execution may purchase the property upon a sale by the sheriff.[3] But a man standing in a fiduciary character with respect to property cannot be allowed to purchase the property at a judicial sale, unless the entire responsibility of obtaining the highest price has been taken out of his hands.[4] If he continues under any duty in respect of the subject-matter of the sale, he is incapacitated from purchasing.[5] Nor will the transaction be allowed to stand, if there appears to have been any unfairness in his conduct with regard to the sale.[6]

The principle which affects dealings between trustee and *cestui que trust* is not confined to trustees properly so called, but extends to other persons invested with a like fiduciary

derson *v.* Walker, 13 Ves. 602; Mulvany *v.* Dillon, 1 Ba. & Be. 418; *Ex-parte* Harrison, Buck, 17; *Ex-parte* Bage, 4 Madd. 460; Anon. 2 Russ. 350; *Ex-parte* Morland, Mont. & M. 76.

[1] Prevost *v.* Gratz, Peters' C. C. (Amer.), 378; Fisk *v.* Sarber, 6 Watts & Serg. (Amer.), 18. See *Ex-parte* Farley, 3 Dea. and Ch. 110; Austin *v.* Chambers, 6 Cl. & Fin. 1; Beaden v. King, 9 Ha. 499. Comp. York Buildings Co. *v.* M'Kenzie, 3 Pat. Sc. App. 398.

[2] Fisk *v.* Sarber, 6 Watts & Serg. (Amer.), 18. See *Ex-parte* Morland, Mont. & M. 76.

[3] Stratford *v.* Twynam, Jac. 418; Chambers *v.* Waters, 3 Sim. 42; S. C. Waters *v.* Groom, 11 Cl. & Fin. 684. See Hawley *v.* Cramer, 4 Cow. (Amer.), 717. Comp. Lord Cranstown *v.* Johnstone, 3 Ves. 182, 5 Ves. 277.

[4] Van Epps *v.* Van Epps, 9 Paige's Ch. (Amer.), 237; Jewett *v.* Miller, 6 Seld. (Amer.), 402. See York Buildings Co. *v.* M'Kenzie, 3 Pat. Sc. Ap. 398; *Ex-parte* Morland, Mont. & M. 76; *Ex-parte* Farley, 3 Dea. & Ch. 110.

[5] Fisk *v.* Sarber, 6 Watts & Serg. (Amer.), 18. See *Ex-parte* Morland, Mont. & M. 76; *Ex-parte* Bennett, 10 Ves. 393; *Ex-parte* Farley, 3 Dea. & Ch. 110.

[6] Lord Cranstown *v.* Johnstone, 3 Ves, 182, 5 Ves. 277; Perens *v.* Johnson, 3 Sm. & G. 419.

character: such as executors and administrators;[1] * assignees of a bankrupt;[2] commissioners of bankrupts and other judicial officers;[3] committees of lunatics;[4] governors of a charity;[5] receivers;[6] directors of a railway or other company;[7] † to ar-

[1] Hall *v.* Hallett, 1 Cox, 134; Killick *v.* Flexney, 4 Bro. C. C. 161; Watson *v.* Toone, 6 Madd. 153; Baker *v.* Carter, 1 Y. & C. 250; Groves *v.* Perkins, 6 Sim. 576; Pickering *v.* Pickering, 2 Beav. 31; Wedderburn *v.* Wedderburn, 4 M. & C. 41; Burton *v.* Hassard, 3 Dr. & War. 461; Allfrey *v.* Allfrey, 1 Mac. & G. 87; Smedley *v.* Varley, 23 Beav. 359; Prideaux *v.* Lonsdale, 1 D. J. & S. 433.

[2] *Ex-parte* Reynolds, 5 Ves. 707; *ex-parte* Hughes, 6 Ves. 617; *ex-parte* Lacey, *ib.* 625; *ex-parte* James, 8 Ves. 337; *ex-parte* Bennett, 10 Ves. 381; *re* Browne, 7 Ir. Ch. 274; Pooley *v.* Quilter, 2 D. & J. 327. See Adams *v.* Sworder, 2 D. J. & S. 44. Leave may be given by the court to the assignee to purchase the bankrupt's estate. *Ex-parte* James, 8 Ves. 348; *ex-parte* Harrison, Buck, 17; *ex-parte* Bage, 4 Madd. 460; *Anon.*, 2 Russ. 350; *ex-parte* Serle, 1 Gl. & Ja. 187; *ex-parte* Beaumont, 1 Mont. & A. 304. In one case an assignee was removed in order that he might bid at a sale of the bankrupt's estate. *Ex-parte* Perks, 3 M. D. & Deg. 385. The leave must be previously obtained. Before the court will entertain any such application on the part of the assignee, he must first obtain the consent of the creditors, at a meeting called for the purpose of enabling them to assent to or dissent from the proposed purchase. *Ex-parte* Molineux, 4 D. & C. 461; *Anon.*, 2 Russ. 350; and even then the court will not make the order, except under very special circumstances. *Ex-parte* Hodgson, 1 Gl. & J. 14; *ex-parte* Towne, 4 D. & C. 519. In a case where the court refused to allow an assignee to bid, he was allowed to name the price he would give, if the property was not sold by auction, and afterwards to buy at that price. *Ex-parte* Holyman, 8 Jur. 156. If a purchase by an assignee be found beneficial, it may be confirmed by the court. *Ex-parte* Gore, 6 Jur. 1118, 7 Jur. 136.

[3] *Ex-parte* James, 8 Ves. 338; *ex-parte* Bennett, 10 Ves. 381. See Campbell *v.* Pennsylvania Life Insurance Co., 2 Wharf. (Amer.) 53.

[4] Wright *v.* Proud, 13 Ves. 136.

[5] Att.-Gen. *v.* Lord Clarendon, 17 Ves. 500.

[6] Alven *v.* Bond, 1 Fl. & Kel. 196; Eyre *v.* McDonnell, 15 Ir. Ch. 534; Boddington *v.* Langford, *ib.* 558.

[7] Benson *v.* Heathorn, 1 Y. & C. C. C. 326; York and North Midland Railway Co. *v.* Hudson, 16 Beav. 485; Great Luxembourg Railway Co. *v.* Magnay,

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* Davoe *v.* Fanning, 2 Johns. Ch. 252; Mulford *v.* Minels, 3 Stock. 16; Meanor *v.* Hamilton, 27 Penn. 137; Swayze *v.* Burk, 12 Pet. 11; Cannon *v.* Jenkins, 1 Dev. Ch. 122.

† Hoffman Steam Coal Co. *v.* Cumberland Coal & Iron Co., 16 Md. 456; Cumberland Coal & Iron Co. *v.* Sherman, 30 Barb. 553; Spence *v.* Whittaker, 3 Port. 297.

A *prochein ami*, Collins *v.* Smith, 1 Head, 251.

A pledgee, Md. Fire Ins. Co. *v* Dalrymple, 25 Md. 242; Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 302.

A person who enters under a contract to purchase, Hallet *v.* Collins, 10 How. 174.

But not to a sale to the sheriff, Mark *v.* Lawrence, 5 H. & J. 64; Isaac *v.* Clark, 2 Gill, 1.

bitrators ;[1] to a member of a corporation taking a lease of the corporate property,[2] and many other cases.[3] The disability extends in general to all persons who being employed or concerned in the affairs of another acquire a knowledge of his property.[4] Partners in business of an assignee in bankruptcy are equally disqualified from purchasing as the assignee himself.[5]

The principle does not, however, apply to the case of a mortgagee dealing with the mortgagor,[6] nor to the case of a puisne mortgagee buying the mortgaged property from a prior mortgagee under the exercise of his power of sale;[7] nor to the case of a tenant for life purchasing from trustees for sale under a power to be exercised with his consent;[8] nor to the case of a tenant for life or mortgagor with power to sell or lease selling or leasing to a trustee for himself;[9] nor does the principle apply to the case of merely nominal trustees, such as trustees who have disclaimed,[10] or trustees to preserve contingent remainders.[11]

If the tenant of charity lands happens to be a trustee, that is a circumstance to excite suspicion, if the land be of an inadequate value. At the same time it must be remembered that the case of a charity estate is one in which of all others the security of the rent is the first object to be regarded. In such

25 Beav. 587; Gaskell *v.* Chambers, 26 Beav. 360; Aberdeen Railway Co. *v.* Blaikie, 1 Macq. 461; *ex-parte* Hill, 32 L. J. Ch. 154; Spackman's Case, 34 L. J. Ch. 321.

[1] Blennerhassett *v* Day, 2 Ba. & Be. 116.

[2] Att.-Gen. *v.* Corporation of Cashel, 3 Dr. & War. 294.

[3] See *ex-parte* Morgan, 12 Ves. 6; Grover *v.* Hugell, 3 Russ. 428; Greenlaw *v.* Hugell, 3 Beav. 49; Beaden *v.* King, 9 Ha. 499; Dimes *v.* Proprietors of Grand Junction Railway Co., 3 H. L. 759; Denton *v.* Donner, 23 Beav. 285; *re* Ronayne's Estate, 13 Ir. Ch. 444.

[4] Sug. V. & P. 587, 14th ed. *supra*, p. 151.

[5] *Ex-parte* Burnell, 7 Jur. 116.

[6] Knight *v.* Marjoribanks, 2 Mac. & G. 10, 2 H. & Tw. 308; Dobson *v.* Land, 8 Ha. 220; but comp. Hickes *v.* Cooke, 4 Dow. 16; Downes *v.* Grazebrook, 3 Mer. 200; *re* Bloye's Trust, 1 Mac. & G. 490; Robertson *v.* Norris, 1 Giff. 421; Ford *v.* Olden, L. R. 3 Eq. 461.

[7] Shaw *v.* Bunny, 2 D. J. & S. 468; Kirkwood *v.* Thompson, *ib.* 613.

[8] Howard *v.* Ducane, T. & R. 81.

[9] Bevan *v.* Habgood, 1 J. & H. 222.

[10] Stacey *v.* Elph, 1 M. & K. 195; Chambers *v.* Waters, 3 Sim. 42.

[11] Parkes *v.* White, 11 Ves. 209, 226.

cases, therefore, the inadequacy of the rent reserved is less a badge of fraud than it would be in almost any other case.[1]

Considerations of a similar character apply to the case of transactions between persons standing to each other in the relation of solicitor and client.[2]* It is the duty of a solicitor to protect the interests of his client. The client is entitled to the full benefit of the best exertions of the solicitor. A solicitor may not bring his own personal interest in any way into conflict with that which his duty requires him to do,[3]† or make a gain for himself in any manner whatever at the expense of his client in respect of the subject of any transactions, connected with or arising out of the relation of solicitor and client, beyond the amount of just and fair professional remuneration to which he is entitled.[4]‡ A solicitor may not even enter into an agree-

[1] *Ex-parte* Skinner, 2 Mer. 457.

[2] See Walmsley *v.* Booth, 2 Atk. 29; Newman *v.* Payne, 2 Ves. Jr. 201; Rhodes *v.* Beauvoir, 6 Bligh, 195; Casborne *v.* Barsham, 2 Beav. 76; Holman *v.* Loynes, 4 D. M. & G. 270.

[3] Lawless *v.* Mansfield, 1 Dr. & War. 557, 631.

[4] Wood *v.* Downes, 18 Ves. 120; Rhodes *v.* Beauvoir, 6 Bligh, 195; Champion *v.* Rigby, Taml. 421, 9 L. J. Ch. N. S. 211; Lyddon *v.* Moss, 4 D. & J. 104; Proctor *v.* Robinson, 35 Beav. 335; Tyrrell *v.* Bank of London, 10 H. L. 26, 44.

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* De Rose *v.* Fay, 3 Edw. Ch. 369; s. c. 4 Edw. Ch. 40; Gray *v.* Emmons, 7 Mich. 533.

† Valentine *v.* Stuart, 15 Cal. 387; Cox *v.* Sullivan, 7 Geo. 144; Hoopes *v.* Burnett, 26 Miss. 428.

‡ Cleavinger *v.* Reimar, 4 W. & S. 486; Brock *v.* Barnes, 40 Barb. 521; Giddings *v.* Eastman, 5 Paige, 561; Barry *v.* Whitney, 3 Sandf. 696.

An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. Williams *v.* Reed, 3 Mason, 455.

An attorney can not abandon his client, and go over to the adverse party. Valentine *v.* Steward, 15 Cal. 387; Wilson *v.* State, 16 Ind. 392; Price *v.* Grand Rapids & Ind. R. R. Co. 18 Ind. 137.

The mere fact that he has obtained knowledge of the matters connected with the suit in the course of other business does not prevent him from acting adversely to his former client. Price *v.* Grand Rapids & Ind. R. R. Co. 18 Ind. 137.

An attorney may make the measure of his compensation a part of the contract by which he agrees to perform the services needed, and such a

ment with a man to be his solicitor in a particular transaction upon the terms of getting a greater benefit than he would obtain by the costs which he is entitled to charge according to the rules of law.[1] If, indeed, a solicitor be a trustee, he is not entitled to charge for professional services in respect of the trust estate.[2]

A solicitor is not under any incapacity to purchase from or sell to a client. A solicitor may deal with a client or purchase a client's property even during the continuance of the relation, but the burthen of proof lies on him to show that the transaction has been perfectly fair.[3*] A prudent man would not deal with his client without the intervention of another solicitor, but there is no rule that a solicitor may not take such a course.[4] He must, however, be prepared to show that he gave his client the same protection as he would have given him, if

[1] Strange *v.* Brennan, 15 L. J. Ch. 389; Pince *v.* Beattie, 32 L. J. Ch. 734; see Re Whitcombe, 8 Beav. 140; comp. Lyddon *v.* Moss, 4 D. & J. 104; Galloway *v.* Corporation of London, L. R. 4 Eq. 90; see further as to accounts between solicitor and client, Nokes *v.* Warton, 5 Beav. 448.

[2] Stanes *v.* Parker, 9 Beav. 385; Todd *v.* Wilson, *ib.* 486.

[3] *Supra*, p. 151.

[4] Cutts *v.* Salmon, 21 L. J. Ch. 750, *per* Lord St. Leonards; Jones *v.* Price, 20 L. T. 49; see Watt *v.* Grove, 2 Sch. & Lef. 503.

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contract will be as binding upon the client as any one into which he can enter. Legatt *v.* Sallee, 3 Port. 115; Wallis *v.* Loubat, 10 Paige, 352; Balsdbaugh *v.* Fraser, 19 Penn. 95; Mills *v.* Mills, 26 Ct. 213. *Contra*, *ex-parte* Plitt, 2 Wallace, Jr. 453.

A judgment by confession to an attorney will only stand as security for what is actually due. Starr *v.* Vandersheydea, 9 Johns. 253.

A security taken during the pendency of a suit can not be enforced for anything beyond the sum actually due. Mott *v.* Harrington, 12 Vt. 199.

An attorney who holds a judgment for himself and a judgment for his client against a common debtor, and collects his own by the use of diligence, beyond the obligations of his trust can not be compelled to pay the money to his client. Cox *v.* Sullivan, 7 Geo. 144.

The doctrine applies to suits before magistrates as well as in court. Buffalow *v.* Buffalow, 2 Dev. & Bat. Eq. 241.

* Evans *v.* Ellis, 5 Denio, 640; Mills *v.* Ervin, 1 McCord's Ch. 524; Matter of Post, 3 Edw. Ch. 369.

dealing with a stranger, and must satisfy the court that he has taken no advantage of his professional position, but has duly and honestly advised his client as an independent and disinterested adviser would have done, and has brought to his knowledge everything which he himself knew necessary to enable him to form a judgment in the matter, and he must in particular be able to show that a just and fair price has been given.[1]* He should, indeed, be prepared to show how the contract was entered into, who made the first offer, and what were the circumstances attending the transaction.[2] The possibility of a speculative or contingent advantage does not fall within those communications which a solicitor is bound to disclose to his client, if the transaction has been in other respects fair, and the point was as much open to the observation of the one party as the other.[3] If a solicitor be employed as an agent for sale or purchase, he may not purchase from or sell to himself surreptitiously without the knowledge or consent of his client.[4]

[1] Gibson *v.* Jeyes, 6 Ves. 277; Montesquieu *v.* Sandys, 18 Ves. 302; Cane *v.* Lord Allen, 2 Dow. 294; Morgan *v.* Lewes, 4 Dow. 29, 47; Molony *v.* L'Estrange, Beat. 406; Champion *v.* Rigby, Taml. 421, 9 L. J. Ch. N. S. 211; Uppington *v.* Bullen, 2 Dr. & War. 185; Edwards *v.* Meyrick, 2 Ha. 60; Higgins *v.* Joyce, 2 J. & L. 282; Spencer *v.* Topham, 22 Beav. 573; Holman *v.* Loynes, 4 D. M. & G. 270; Hesse *v.* Briant, 6 D. M. & G. 623; Savery *v.* King, 5 H. L. 627; Tomson *v.* Judge, 3 Drew. 306; Barnard *v.* Hunter, 2 Jur. N. S. 1213; Knight *v.* Bowyer, 2 D. & J. 421, 445; Gresley *v.* Mousley, 4 D. & J. 78, 3 D. F. & J. 433; Lyddon *v.* Moss, 4 D. & J. 104; Morgan *v.* Higgins, 1 Giff. 270; Crowdy *v.* Day, *ib* 316; Pearson *v.* Benson, 28 Beav. 599; Marquis of Clanricarde *v.* Henning, 30 Beav. 175; Beale *v.* Billing, 13 Ir. Ch. 250; Gibbs *v.* Daniel, 4 Giff. 1; Adams *v.* Sworder, 2 D. J. & S. 44; Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252.

[2] Jones *v.* Price, 20 L. T. 49; see Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252; see also Moore *v.* Prance, 9 Ha. 299, where a deed was set aside though the solicitor derived no benefit from it.

[3] Edwards *v.* Meyrick, 2 H. 60; see Montesquieu *v.* Sandys, 18 Ves. 302; Ramsbottom *v.* Parker, 6 Madd. 6; Holman *v.* Loynes, 4 D. M. & G. 270; Wentworth *v.* Lloyd, 32 Beav. 467.

[4] *Ex-parte* James, 8 Ves. 352; *Ex-*

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* Mills *v.* Ervin, 1 McCord's Ch. 524; Bibb *v.* Smith, 1 Dana, 582; Downing *v.* Major, 2 Dana, 228; Rose *v.* Mynatt, 7 Yerg. 30; Phelps *v.* Overton, 4 Hayw. 292; Lecutt *v.* Sallee, 3 Port. 115; Marshall *v.* Joy, 17 Vt. 546; Howell *v.* Ransom, 11 Paige, 538; Smith *v.* Thompson, 7 B. Mon. 505; Lewis *v.* A. J. 4 Edw. Ch. 599.

If the sale be under a decree of the court, a solicitor employed in the cause, who wishes to purchase, should first obtain leave of the court.[1] A solicitor employed in the sale of an estate should not bid for the estate though it may be merely for the purpose of preventing it going at an undervalue, unless he first obtain the leave of the court to do so. If he do so without the leave of the court and there is no higher bidder, he may, if the court thinks proper, be held to the purchase.[2]

The rule that a solicitor who deals with a client is bound to prove the fairness of the transaction applies with peculiar force where the client is placed at a disadvantage from his being indebted to the solicitor, and gives him a security for the debt.[3] If, however, the court is satisfied that the transaction has been on the whole fair and reasonable, and that no undue advantage has been taken, it will be supported, although there may have been some irregularities attending it.[4] A solicitor who advances money to or has dealings with a client must be able to prove the advance of the money by some other evidence than the instrument creating the security.[5] A

parte Bennett, 10 Ves. 381; Cane *v.* Lord Allen, 2 Dow. 294; Rhodes *v.* Beauvoir, 6 Bligh, 195; Sidney *v.* Ranger, 12 Sim. 118; Bloye's Trust, 1 Mac. & G. 488; Lewis *v.* Hillman, 3 H. & L. 607; Tyrrell *v.* Bank of London, 10 H. L. 26, 44; Adams *v.* Sworder, 2 D. J. & S. 44.

[1] Sidney *v.* Ranger, 12 Sim. 118.

[2] Nelthorpe *v.* Pennyman, 14 Ves. 517.

[3] Proof *v.* Hines, ca. t. Talb. 115; Walmsley *v.* Booth, 2 Atk. 29; Draper's Co. *v.* Davis, *ib.* 295; Ward *v.* Hartpole, cit. 3 Bli h, 470; Newman *v.* Payne, 2 Ves. Jr. 200; Cooke *v.* Setree, 1 V. & B. 126; Daly *v.* Kelly, 4 Dow. 417, 430; Casborne v. Barsham, 2 Beav. 76; Champion *v.* Rigby, Taml. 421, 9 L. J. Ch. N. S. 211; Bellamy *v.* Sabine, 2 Ph. 425; Lawless *v.* Mansfield, 1 Dr. & War. 557; Uppington *v.* Bullen, 2 Dr. & War. 185; Edwards *v.* Meyrick, 2 Ha. 60; Shaw *v.* Neale, 20 Beav. 157; Coleman *v.* Mellersh, 2 Mac. & G. 309; Holman *v.* Loynes, 4 D. M. & G. 270; Lyddon *v.* Moss, 28 Beav. 598; see Jones *v.* Thomas, 2 Y. & C. 498; Morgan *v.* Higgins, 1 Giff. 270; Re Foster, 2 D. F. & J. 110; Re Pugh, 1 D. J. & S. 673.

[4] Jones *v.* Roberts, 9 Beav. 419; Blagrave *v.* Routh, 8 D. M. & G. 621; see Cooke *v.* Setree, 1 V. & B. 126; Plenderleath *v.* Frazer, 3 V. & B. 174; Lawless *v.* Mansfield, 1 Dr. & War. 557; Stedman *v.* Collett, 17 Beav. 608; Moss *v.* Bainbrigge, 6 D. M. & G. 292; see Cheslyn *v.* Dalby, 2 Y. & C. 170; comp. Lyddon *v.* Moss, 4 D. & J. 104.

[5] Morgan *v.* Lewes, 4 Dow. 46; Morgan *v.* Evans, 3 Cl. & Fin. 195; Lawless *v.* Mansfield, 1 Dr. & War 557; Gresley *v.* Mousley, 3 D. F. & J. 433; see Jones *v.* Thomas, 2 Y. & C. 498; Stainton *v.* Carron Co. 24 Beav. 352.

solicitor cannot, under any circumstances, take security from his client for future costs,[1] or for moneys to be advanced for the purposes of a cause;[2] but the security given by a client to his solicitor for past costs or for moneys actually due will be supported if *bonâ fide*.[3]

The statement of an untrue consideration in a deed of purchase or sale between attorney and client is fatal to the deed. The court will never support a deed where an attorney is purchaser and the consideration is untruly stated.[4]

The rule which throws upon a solicitor dealing with his client the burthen of proving the fairness of the transaction is not confined to cases where the solicitor is actually employed at the time, but may extend to cases where a solicitor has in the course of his employment on a previous occasion acquired or had the means of acquiring any peculiar knowledge as to the property.[5] * As a general rule, however, it no longer ap-

[1] Jones *v.* Tripp, Jac. 322; Williams *v.* Piggott, *ib.* 598; Booth *v.* Creswicke, 13 L. J. Ch. 217; Coleman *v.* Mellersh, 2 Mac. & G. 309; see Pitcher *v.* Rigby, 9 Pri. 79.

[2] Uppington *v.* Bullen, 2 Dr. & War. 184.

[3] Cheslyn *v.* Dalby, 2 Y. & C. 170; Edwards *v.* Meyrick, 2 Ha. 60.

[4] Uppington *v.* Bullen, 2 Dr. & War. 184; see Holman *v.* Loynes, 4 D. M. & G. 270.

[5] Holman *v.* Loynes, 4 D. M. & G. 270; Gibbs *v.* Daniel, 4 Giff. 1; see Carter *v.* Palmer, 8 Cl. & Fin. 657, 707.

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* Galbraith *v.* Elder, 8 Watts, 81; Reid *v.* Stanley, 6 W. & S. 326; Hockenburg *v.* Carlisle, 5 W. & S. 348.

As the necessities of litigation compel confidence on one side, the policy of the law requires fidelity on the other. The policy which enjoins good faith requires that it should never be violated. The reasons for requiring it, all demand that it should be perpetual. Occasions may arise when an upright counsellor may feel himself bound to withdraw from his client's cause, but no circumstances whatever can justify him in betraying the trust reposed under the highest obligation of professional honor. Where fidelity is required, the law prohibits everything which presents a temptation to betray the trust. The orison which deprecates temptation is the offspring of infinite wisdom, and the rule of law in accordance with it, rests upon the most substantial foundations. The purchase by an at-

plies after there has been an entire cessation of the relation;[1] nor will it apply in cases where the transaction is entirely unconnected with the duty of the attorney.[2]* Nor will it apply with the same force where the relation though not terminated has been loosened and the influence consequent on the relation which formerly existed between the parties is not subsisting in its full and perfect force.[3] The solicitor of a plaintiff out of whose hands the property is entirely taken by act of law, as upon a sale by execution, is not debarred from purchasing the property in execution. Neither the defendant in the execution nor a third person can object to the validity of the transaction.[4]† But as between him and his client, the transaction

[1] Gibson *v.* Jeyes, 6 Ves. 277; Wood *v.* Downes, 18 Ves. 120; Montesquieu *v.* Sandys, *ib.* 313; Cane *v.* Lord Allen, 2 Dow. 289; Moss *v.* Bainbrigge, 6 D. M. & G. 292; see Dent *v.* Bennett, 4 M. & C. 269, 277; Carter *v.* Palmer, 8 Cl. & Fin. 657; Blagrave *v.* Routh, 8 D. M. & G. 620.

[2] See Jones *v.* Thomas, 2 Y. & C. 519.

[3] Moss *v.* Bainbrigge, 6 D. M. & G. 292.

[4] Howell *v.* Baker, 4 Johns. Ch. (Amer.), 121; Hawley *v.* Cramer, 4 Cow. (Amer.). 717; see Austin *v.* Chambers, 6 Cl. & Fin. 1, *supra*, p. 159.

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torney of an interest in the thing in controvery in opposition to the title of his client, is forbidden because it places him under temptation to be unfaithful to his trust. Such a purchase, therefore, enures to the benefit of his client. Where the confidence has relation to the title to land, the fidelity of the counsel must necessarily follow the title of his client wherever it goes. Any other rule would defeat the object of the trust by destroying the market value of the title. If the client's vendee, and even his orphan children may be ruined by means of violating the trust reposed by their vendor or ancestor, and such breaches of trust are sanctioned by the courts, all land titles would be in jeopardy, the bar would cease to enjoy the confidence of the people and the courts of justice, instead of being the bulwarks of public and private security, would become the most intolerable engines of disturbance and oppression. Henry *v.* Raiman, 25 Penn. 354.

An attorney may buy other property in good faith, even though it adjoins the property owned by his client. Smith *v.* Brotherline, 62 Penn. 461.

* Wendell *v.* Van Renssler, 1 Johns. Ch. 344.

† Leach *v.* Fowler, 22 Ark. 143.

In order to relieve an attorney from the obligation to which the pre-

is not valid, if the sum given by him is insufficient to satisfy the debt, unless the client assents to the purchase. If, however, the purchase-money is sufficient to pay the debt of the client, the latter cannot object to the transaction.[1]*

The rule which throws upon a solicitor dealing with his client the burthen of proving the fairness of the transaction, applies to the case of voluntary agreements, and not to a case where the solicitor is in the hostile attitude of an urgent and pressing creditor.[2] Nor does the rule apply, where the transaction is totally disconnected with the relation and concerns, objects, and things not embraced in, or affected by, or dependent

[1] Hawley *v.* Cramer, 4 Cow. (Amer.), 717.

[2] Johnson *v.* Fesenmeyer, 3 D. & J. 13; Pearson *v.* Benson, 28 Beav. 599; see Moss *v.* Bainbrigge, 6 D. M. & G. 292.

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sumption of law gives rise, it must appear affirmatively that, before the transaction or dealing took place, the relation was completely at an end, so that no influence could rationally be supposed any longer to exist. Lewis *v.* A. J. 4 Edw. Ch. 599.

* Case *v.* Carroll, 35 N Y. 385; Moore *v.* Bracken, 27 Ill. 23; Howell *v.* Baker, 4 Johns. Ch. 118; Leisinring *v.* Black, 5 Watts, 303; Wade *v.* Pettebone, 11 Ohio, 557; Smith *v.* Thompson, 7 B. Mon. 305; Stockton *v.* Ford, 11 How. 232.

If there are two plaintiffs in an execution, an attorney can not purchase the property levied upon for the benefit of one without the consent of the other for less than the whole sum due on the judgments. Leisinring *v.* Black, 5 Watts, 303; Hawley *v.* Cramer, 4 Cow. 717; Webb *v.* White, 18 Tex. 572.

A purchase alone does not make an attorney a trustee. He is a trustee only at the instance of his principal. Downey *v.* Garrard, 12 Harris, 52; s. c. 3 Grant, 64.

An attorney is bound to perfect fairness, and can not take advantage of untoward circumstances to force a sale to the ruin of a debtor, and to his own profit. Byers *v.* Surget, 19 How. 303; s. c. 1 Hemp. 715.

The rule does not apply between the attorney and grantees of tenants in common with his client. Cowan *v.* Barrett, 18 Mo. 257.

An attorney for the defendant may purchase property sold under an execution. Devinney *v.* Norris, 8 Watts, 314; Cleavinger *v.* Reimar, 3 W. & S. 486.

upon that relation.[1] The fact that the purchaser may be a solicitor, and that the vendor had no legal adviser, there having been no previous relation of solicitor and client between them, does not bring the case within the ordinary rule of the court in such cases.[2]

The rule with regard to gifts by a client to his solicitor is much stricter than the rule with regard to other dealings between them. Gifts from a client to a solicitor during the existence of the relation appear, upon the balance of authorities, to be absolutely invalid upon grounds of public policy; nor can a gift by a client to a solicitor, after the cessation of the relation, be supported, unless the influence arising from the relation may be rationally supposed to have ceased also.[3] * There is no difference in principle between a gift to a man's wife and a gift immediately to himself, if the gift to the wife be affected by undue means on the part of the husband.[4] The rule in respect to benefits conferred by will is different. A solicitor may take a benefit under the will of a client, although he may himself have prepared it, if no undue influence was

[1] Montesquieu *v.* Sandys, 18 Ves. 313; Jones *v.* Thomas, 2 Y. & C. 498; Edwards *v.* Meyrick, 2 Ha. 60, 68.

[2] Edwards *v.* Williams, 11 W. R. 561.

[3] Welles *v.* Midd'eton, 1 Cox, 112, 4 Bro. P. C. 245; Newman *v.* Payne, 2 Ves. Jr. 200; Wright *v.* Proud 13 Ves. 137, *per* Lord Eldon; Wood *v.* Downes, 18 Ves. 120; Goddard *v.* Carlisle, 9 Pri. 169; Ward *v.* Hartpole, cit. 3 Bligh, 470; Walsh *v.* Studdert, 2 Con. & L. 423; Tomson *v.* Judge, 3 Drew. 306; Holman *v.* Loynes, 4 D. M. & G. 270, 283; *Re* Holmes's Estate, 3 Giff. 337; Gibbs *v.* Daniel, 4 Giff. 1; O'Brien *v.* Lewis, 4 Giff. 221; but see Oldham *v.* Hand, 2 Ves. 259; Harris *v.* Tremenheere, 15 Ves. 34; Hunter *v.* Atkins, 2 M. & K. 113; Walker *v.* Smith, 29 Beav. 394.

[4] Goddard *v.* Carlisle, 9 Pri. 169.

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* The presumption is against the propriety of gifts, but it is not invincible. Nesbit *v.* Lockman, 34 N. Y. 167; Brock *v.* Barnes, 40 Barb. 521.

The moment that it is ascertained that the relation is finally closed, gratitude may be munificent, or even prodigal. But it must be clearly seen that the bounty springs from unfettered gratitude, not from previous entanglements; that it is a free-will offering for difficulties overcome, not the fulfillment of a vow extorted in peril. Berrien *v.* McLane, 1 Hoff. Ch. 42; Legatt *v.* Salle, 3 Port. 115.

exerted by him over the testator,[1] and the will was not executed under any mistake or misapprehension caused by himself.[2] But a solicitor cannot be allowed to take any benefit from his own professional ignorance. A solicitor is bound to have full professional knowledge, and to give the information to his client. If a solicitor is employed to prepare a deed, or to make a will, the law imputes to him a knowledge of all the legal consequences to result therefrom, and requires that he should distinctly and clearly point out to his client all those consequences from which a benefit may arise to himself from the instrument so prepared. If he fail to do so, he cannot, as against his client or any one claiming under him, derive any benefit under the instrument.[3]

The principles which apply in the case of dealings between solicitor and client, are also applicable to the case of a counsel employed by a man as his confidential adviser;[4] to the case of a man who has constituted himself the legal adviser of another,[5] or has offered him legal advice in the matter;[6] and to the case of the clerk of a solicitor who has acquired the confidence of a client of his master.[7]* In Parnell *v.* Tyler,[8] where, on a sale by a mortgagee, the purchaser had employed a clerk of the solicitor of the mortgagee to bid for him, the transaction was set aside.

[1] Walker *v.* Smith, 29 Beav. 394.

[2] Hindson *v.* Weatherill, 5 D. M. & G. 301; see Raworth *v.* Marriott, 1 M. & K. 643.

[3] Segrave *v.* Kirwan, Beat. 157; Macdonald *v.* Lillie, 1 Bligh, 315; Bulkley *v.* Wilford, 2 Cl. & Fin. 102, 8 Bligh's N. S. 111; Bayly *v.* Wilkins, 3 J. & L. 630; Nanney *v.* Williams, 22 Beav. 452; Corley *v.* Stafford, 1 D. & J. 238; Greenfield *v.* Bates, 5 Ir. Ch. 219; see Langley *v.* Fisher, 9 Beav. 100; Waters *v.* Thorn, 22 Beav. 547.

[4] Purcell *v.* Macnamara, 14 Ves. 91; M'Cabe *v.* Hussey, 2 Dow & Cl. 440, 5 Bligh's N. S. 715; Carter *v.* Palmer, 8 Cl. & Fin. 657, 707; Brown *v.* Kennedy, 33 Beav. 133.

[5] Tate *v.* Williamson, L. R. 1 Eq. 528; 2 Ch. App. 65; see Wyse *v.* Lambert, 16 Ir. Ch. 379.

[6] Davis *v.* Abraham, 5 W. R. 465.

[7] Hobday *v.* Peters, 28 Beav. 349; Nesbitt *v.* Berridge, 32 Beav. 284; Poillon *v.* Martin, 1 Sandf. Ch. (Amer.) 569.

[8] 2 L. J. Ch. N. S. 195.

* Poillon *v.* Martin, 1 Sandf. Ch. 569.

Considerations of a like nature apply to the case of persons standing in the relation of principal and agent. A person who is an agent for another undertakes a duty in which there is a confidence reposed, and which he is bound to execute to the utmost advantage of the person who employs him. The principal is entitled to the full benefit of the best exertions of the agent. An agent cannot be allowed to place himself in a situation which, under ordinary circumstances, might tempt him not to do that which is the best for his principal. He may not derive any profit or advantage from the business in which he is employed, beyond the compensation to which he is entitled for his services.[1] *

[1] East India Co. *v.* Henchman, 1 Ves. Jr. 289; Massey *v.* Davis, 2 Ves. Jr. 317; *Ex-parte* Hughes, 6 Ves. 617; York Buildings Co. *v.* M'Kenzie, 3 Pat. Sc. Ap. 398, 3 Ross's L. C. Sc. 305; Rothschild *v.* Brockman, 2 Dow & Cl. 188, 5 Bligh's N. S. 165; Benson *v.* Heathorn, 1 Y. & C. C. C 342; Bentley *v.* Craven, 18 Beav. 75; Beck *v.* Kantorowicz, 3 K. & J. 230; Maxwell *v.* Port Tenant Patent Steam Fuel Co, 24 Beav. 495; Tyrrell *v.* Bank of London, 10 H. L. 26, 39; Attwool *v.* Merryweather, 37 L. J. Ch. 35; see Benson *v.* Heathorn, 1 Y. & C. C. C. 326; Ritchie *v.* Couper, 28 Beav. 344; Walsham *v.* Stainton, 1 D. J. & S. 678.

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* Read *v.* Warner, 5 Paige, 650; Banker *v.* Miles, 30 Me. 431; Knabe *v.* Pernot, 16 La. An. 13; Meeker *v.* York, 13 La. An. 18; Bruce *v.* Davenport, 36 Barb. 349; Grant *v.* Seitzinger, 2 Penna. 525; Massie *v.* Watts, 6 Cranch, 148; Church *v.* Sterling, 16 Ct. 388; Myers' Appeal, 2 Barr, 463; McDonald *v.* Fithian, 1 Gilman, 269; Kanada *v.* North, 14 Mo. 615.

The paramount and vital principle of the law governing the relation of principal and agent, is good faith; and so sedulously is this principle guarded, that all departures from it are esteemed frauds upon the confidence bestowed. Keighler *v.* Savage Manuf. Co., 12 Md. 383.

An agent who purchases property for himself, which he is employed to purchase for another, becomes a trustee for his principal. Massie *v.* Watts, 6 Cranch, 148; Church *v.* Sterling, 16 Ct. 388; Parkhurst *v.* Alexander, 1 Johns. Ch. 394; James *v.* M'Kernan, 6 Johns. 543; McKinley *v.* Irvine, 13 Ala. 381; Wellford *v.* Chancellor, 5 Gratt. 39; Matthews v. Light, 32 Me. 305; Schedda *v.* Sawyer, 4 McLean, 181; Blount *v.* Robeson, 3 Jones' Eq. 73; Gardner *v.* Ogden, 22 N. Y. 327; Moore *v.* Mandelbaum, 8 Mich. 433; Pillsbury *v.* Pillsbury, 17 Me. 107; Burrill *v.* Bull, 3 Sandf. Ch. 15; Hargraves *v.* King, 5 Ired. Eq. 491.

An agent who is employed to sell property, can not make himself agent

There is no rule to prevent an agent from dealing with his principal in respect of the matter in which he is employed as agent. But an agent who seeks to uphold a transaction between himself and his principal, must be able to show to the satifaction of the court that he gave his principal the same advice in the matter as an independent and disinterested adviser would have done, and made a full disclosure of all he knew respecting the property, and that the principal knew with whom he was dealing, and made no objection to the transaction, and that the price was just and fair.[1] * However

[1] York Buildings Co. *v.* M'Kenzie, 3 Pat. Sc. Ap. 398, 3 Ross' L. C. Sc. 305; Lowther *v.* Lowther, 13 Ves. 103; Watt *v.* Grove, 2 Sch. & Lef. 492; Woodhouse *v.* Meredith, 1 J. & W. 204; Lord Selsey *v.* Rhoades, 2 Sim. & St. 41, 1 Bligh's N. S. 1; Cane *v.* Lord Allen, 2 Dow. 294; Rothschild *v.* Brockman, 2 Dow & Cl. 188, 5 Bligh's N. S. 165; Barker *v.* Harrison, 2 Coll. 546; Molony *v.* Kernan, 2 Dr. & War. 31; Trevelyan *v.* Charter, 4 L. J. Ch. N. S. 209; Charter *v.* Trevelyan, 11 Cl. & Fin. 714, 732; Mulhallen *v.* Marum, 3 Dr. & War. 317; Murphy *v.* O'Shea, 2 J. & L. 422, 425; Clarke *v.* Tipping, 9 Beav. 284; Bloye's Trust, 1 Mac. & G. 488; Lewis *v.* Hillman, 3 H. L. 607; Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252.

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for other parties for the purchase thereof. Moore *v.* Mandelbaum, 8 Mich. 433.

An auctioneer can not purchase at a sale made by himself. Kearney *v.* Taylor, 15 How. 494; Veazie *v.* Williams, 8 How. 134; Ingerson *v.* Starkweather, Walk. Ch. 346.

If an agent converts property, the principal may, at his election, ratify the transaction, and claim whatever profits are made by it. Motley *v.* Motley, 7 Ired. Eq. 211.

If a person at a judicial sale represents that he is bidding in the interest of the owner, and thereby prevents competition, he becomes a mere trustee for the owner. Cocks *v.* Izard, 7 Wall. 559; Brewer *v.* Lynch, 1 Paige, 147; Denton *v.* McKenzie, 1 Dessau. 289; Martin *v.* Blight, 4 J. J. Marsh. 491; Wood *v.* Hudson, 5 Munf. 423.

An agent buying property under the judgment of his principal, becomes a mere trustee for his principal if he buys for less than the claim. Smith *v.* Lansing, 22 N. Y. 520; Eishleman *v.* Lewis, 49 Penn. 410.

* Brooke *v.* Berry, 2 Gill. 83; Teackle *v.* Bailey, 2 Brock. 43; Torrey *v.* Bank of Orleans, 9 Paige. 649; s. c. 7 Hill, 260; Dobson *v.* Racey, 7 N. Y. 216; Moseley *v.* Buck, 3 Munf. 232; Butler *v.* Haskell, 4 Dessau. 651; Taylor *v.* Knox, 1 Dana, 391; s. c. 5 Dana, 466; Marshall *v.* Joy, 17 Vt. 546; Casey *v.* Casey, 14 Ill. 112; Fisher's Appeal, 34 Penn. 29; Moore *v.*

fair the transaction may be in other respects, any underhand dealing on the part of an agent will render it impeachable at the election of the principal. It is immaterial that the agent may have taken no advantage by the bargain. It is sufficient that he has not acted with that good faith which the court requires, and has placed himself in a situation which might tempt an agent to allow his own interest to come into conflict with that which his duty requires him to do.[1] *

An agent who is employed to sell, cannot become the purchaser surreptitiously and without the knowledge or assent of his employer;[2] † nor can an agent, who is employed to purchase, purchase secretly from himself, or from his own trustee,[3] ‡

[1] Gillett *v.* Peppercorne, 3 Beav. 78; Murphy *v.* O'Shea, 2 J. & L. 422; Charter *v.* Trevelyan, 11 Cl. & Fin. 714; Clarke *v.* Tipping, 9 Beav. 284; Wilson *v.* Short, 6 Ha. 383; Hobday *v.* Peters, 28 Beav. 349; Tyrrell *v.* Bank of London, 10 H. J. 26; Wentworth *v.* Lloyd, 32 Beav. 467.

[2] York Buildings Co. *v.* M'Kenzie, 3 Pat. Sc. Ap. 398, 3 Ross's L. C. Sc. 305; *Ex-parte* Hughes, 6 Ves. 617; Woodhouse *v.* Meredith, 1 J. & W. 204; Trevelyan *v.* Charter, 4 L. J. Ch. N. S. 209; Charter *v.* Trevelyan, 11 Cl. & Fin. 714; Edgecumbe *v.* Stranger, 1 Jur. 400; Murphy *v.* O'Shea, 2 J. & L. 422; Lewis *v.* Hillman, 3 H. L. 607; Bentley *v.* Craven, 18 Beav. 75.

[3] East India Co. *v.* Henchman, 1 Ves. Jr. 289; Massey *v* Davies, 3 Ves. 317;

Mandelbaum, 8 Mich. 433; Farnam v. Brooks, 9 Pick. 212; Comstock *v.* Comstock, 57 Barb. 453

If a party entering into a contract has the full means of knowledge committed to him by the other party, and does not choose or neglects to avail himself of them, it is his own fault if the bargain turns out unfavorable. Farnam *v.* Brooks, 9 Pick. 212.

* Moore *v.* Moore, 5 N. Y. 256; s. c. 4 Sandf. Ch. 37; Gould *v.* Gould, 36 Barb. 270; Segar *v.* Edwards, 11 Leigh, 213; Shannon *v.* Marmaduke, 14 Tex. 217; Barton *v.* Moss, 32 Ill. 50; Cram *v.* Mitchell, 1 Sandf. Ch. 251; Cumberland Coal Co. *v.* Sherman, 30 Barb. 553.

† Dobson *v.* Racey, 3 Sandf. Ch. 60; Torrey *v.* Bank of New Orleans, 9 Paige, 649; Banks *v.* Judah, 8 Ct. 145.

Such a purchase is not void, but voidable. Gaines *v.* Acre, Minor, 141.

There is no distinction between a judicial and a private sale, where the agent controls, and the officer acts under his instructions. Moore *v.* Moore, 5 N. Y. 256; Bridgen *v.* Atkins, 25 Tex. 388

‡ Conkey *v.* Bond, 36 N. Y. 427; s. c. 13 Abb. Pr. (N. S.) 415; Marshall *v.* Joy, 17 Vt 546.

The rule applies only to agents who are relied upon for counsel and

or for his own benefit.[1] The rule applies whether the agent employed to purchase was actually in the position of a vendor, or intended to place himself in that position.[2] So also an agent who is employed to settle a debt, or to make an arrangement, cannot purchase up the debt, or any charge upon the property which is the subject of the arrangement, for his own benefit.[3] The disability extends to the clerk of an agent who, in the course of his employment, has acquired a knowledge of the property of the principal.[4]

The rule that an agent dealing with his principal must impart knowledge acquired in his office, does not apply where the relation has ceased, and there is another agent with equal means of knowledge, to guard the interest of the principal in the transaction.[5] After the relation of principal and agent has wholly ceased, or the agent has divested himself of that character, the parties are restored to their competency to deal with each other.[6] But an agent who has, in the course of his employment, acquired some peculiar knowledge as to the property, cannot, after the cessation of the relation, use the knowledge so acquired for his own benefit, and to the prejudice of his former client.[7]

Rothschild *v.* Brockman, 2 Dow & Cl. 188; Driscoll *v.* Bromley, 1 Jur. 238; Gillett *v.* Peppercorne, 3 Beav. 78; Barker *v.* Harrison, 2 Coll. 546; Bentley *v.* Craven, 18 Beav. 75; Maturin *v.* Tredinnick, 9 L. T. N. S. 82; Tyrrell *v.* Bank of London, 10 H. L. 26.

[1] Lees *v.* Nuttall, 2 M. & K. 819; Taylor *v.* Salmon, 4 M. & C. 134; see Carter *v.* Palmer, 8 Cl. & Fin. 657; Beck *v.* Kantorowicz, 3 K. & J. 230; Hobday *v.* Peters, 28 Beav. 349.

[2] Beck *v.* Kantorowicz, 3 K. & J. 242.

[3] Cane *v.* Lord Allen, 2 Dow. 294; Reed *v.* Norris, 2 M. & C. 361; Carter *v.* Palmer, 8 Cl. & Fin. 657, 11 Bligh's N. S. 397; Hobday *v.* Peters, 28 Beav. 349.

[4] Gardner *v.* Ogden, 8 Smith (Amer.) 327.

[5] Scott *v.* Dunbar, 1 Moll. 442.

[6] Charter *v.* Trevelyan, 4 L. J. Ch. N. S. 209; see York Buildings Co. *v.* M'Kenzie, 3 Pat. Sc. Ap. 379, *supra*, pp. 153, 159, 167.

[7] Carter *v.* Palmer, 8 Cl. & Fin. 657; Holman *v.* Loynes, 4 D. M. & G. 270.

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direction, and whose employment is rather a trust than a service, and not to those who are employed merely as instruments in the performance of some appointed service. Deep River Gold Mining Co. *v.* Fox, 4 Ired. Eq. 61.

An agent, for instance, who in the course of his employment as such has discovered a defect in the title of his employer, cannot after the relation has ceased use his knowledge so gained to acquire a title for himself.[1] * Nor can a man who is employed as a confidential agent escape from liability under the pretence that the business has been entrusted to an agent and not to him, unless it can be shown that the agent was intended to act, and in fact acted independently of him.[2]

There is no rule preventing the same agent from acting for the opposing parties, but he must be able to satisfy the court that the parties were substantially at arms' length in the transaction, and that there has been the utmost fairness throughout.[3] †

A gift by a man to a person who has been for many years his confidential agent and adviser is valid, unless the party who seeks to set it aside can show that some advantage was taken by the agent of the relation in which he stood to the donor. If the conduct of the agent in the matter appears to have been fair, honest, and *bonâ fide*, it is immaterial that the deed of gift may have been drawn up by his solicitor without the intervention of a disinterested third party.[4] The rule with respect to the capacity of an agent to accept a gift from his principal is not so strict as it is in the case of

[1] Ringo *v.* Binns, 10 Peters (Amer.), 269.

[2] Rhodes *v.* Bates, L. R. 1 Ch. Ap. 252.

[3] Hesse *v.* Briant, 6 D. M. & G. 623; Garvey *v.* McMinn, 9 Ir. Eq. 526; see Rhodes *v.* Beauvoir, 6 Bligh's N. S. 195; Matthie *v.* Edwards, 16 L. J. Ch. 405.

[4] Hunter *v.* Atkins, 3 M. & K. 113; Nicol *v.* Vaughan, 1 Cl. & Fin. 495; see Wyse *v.* Lambert, 16 Ir. Ch. 379; Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252.

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* Ringo *v.* Binns, 10 Pet. 269.

† Greenwood *v.* Spring, 54 Barb. 375. A person can not be agent for both parties when judgment or discretion is to be exercised. Vanderpoel *v.* Kearney, 2 E. D. Smith, 170; Dunlob *v.* Richards, 2 E. D. Smith, 181; Central Ins. Co. *v.* Protective Ins. Co., 14 N. Y. 85.

attorney and client, trustee and *cestui que trust*, and guardian and ward. The relation in which the parties stand to each other being of a sort less known and definite than in those other cases, the jealousy is diminished.[1]

The rule of equity with respect to dealings between guardian and ward is extremely strict,[2] * and imposes a general inability on the parties to deal with each other.[3] † Where the relation of guardian and ward is subsisting between two parties, if a gift or anything in the nature of a gift proceeds from the ward towards the guardian, when the ward has just come of full age, such transactions are subject to be viewed with the utmost jealousy by courts of equity. It is almost impossible that transactions of such a nature can be sustained, unless the party claiming the benefit of the gift can show to the satisfaction of the court that his influence has not been misapplied in the particular transaction. Unless it appears to be a spontaneous act on the part of the ward, or unless he was informed in all the particulars of the nature, character, and probable consequence of his proceeding, such a transaction cannot stand.[4] ‡ Transactions between guardian and ward cannot be allowed to stand, even although they may have taken place after the guardianship has come to a close, unless

[1] Hunter *v.* Atkins, 3 M. & K. 113; but see Hobday *v.* Peters, 28 Beav. 349.

[2] Hylton *v.* Hylton, 2 Ves. 548, 549; Hatch *v.* Hatch, 9 Ves. 292.

[3] See Dawson *v.* Massey, 1 B. & B. 226. *Tutor rem pupilli emere non potest.* Dig. xviii, tit. 1, leg. 347.

[4] Archer *v.* Hudson, 15 L. J. Ch. 211; Mulhallen *v.* Marum, 3 Dr. & War. 317; see Oldin *v.* Samborn, 2 Atk. 15; Beasley *v.* Magrath, 2 Sch. & Lef. 35.

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* Hanna *v.* Spotts, 5 B. Mon. 362; Whilt *v.* Parker, 8 Barb. 48; Vannickle *v.* Malta, 16 La. An. 325.

† Galatian *v.* Erwin, 1 Hopk. 48; Lee *v.* Fox, 6 Dana, 171; Walker *v.* Walker, 101 Mass. 169; Scott *v.* Freeland, 7 S. & M. 409; Meek *v.* Perry, 36 Miss. 190.

‡ Waller *v.* Armistead, 2 Leigh, 11; Love *v.* Lea, 2 Ired. Eq. 627. There is no distinction between a deed given as a gratuity, and a deed of release, acquittance, or discharge. Waller *v.* Armistead, 2 Leigh, 11.

the influence which is presumed to arise from the relation has ceased to exist.[1] * The influence may continue to exist for a considerable time after the actual relation has ceased to exist.[2] As long as the accounts between the parties have not been fully settled, or the estate still remains in some sort under the control of the guardian, the influence will be presumed to exist.[3] † The influence will indeed be presumed to exist, unless there is distinct evidence of its determination.[4] After the relation has entirely ceased not merely in name but in fact, and a full and fair settlement of all transactions arising out of the relation has been made, and sufficient time has elapsed to put the parties in a position of complete independence to each other, there is no objection to any bounty or grant conferred by the ward on his former guardian.[5]

It is not necessary for the application of the principle that

[1] Hylton *v.* Hylton, 2 Ves. 548, 549; Hatch *v.* Hatch, 9 Ves. 292; Carey *v.* Carey, 2 Sch. & Lef. 173; Dawson *v.* Massey, 1 B. & B. 219; Aylward *v.* Kearney, 2 B. & B. 478; O'Neill *v.* Hammill, Beat. 618; Maitland *v.* Irving, 15 Sim. 437; Archer *v.* Hudson, 15 L. J. Ch. 211; Maitland *v.* Backhouse, 17 L. J. Ch. 121; Espey *v.* Lake, 10 Ha. 260; see Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252.

[2] Hatch *v.* Hatch, 9 Ves. 292; Aylward *v.* Kearney, 2 B. & B. 463; O'Neill *v.* Hammill, Beat. 618; Revett *v.* Harvey, 1 Sim. & St. 502; Maitland *v.* Irving, 15 Sim. 437; Archer *v.* Hudson, 15 L. J. Ch. 211; Maitland *v.* Backhouse, 17 L. J. Ch. 121; Davies *v.* Davies, 9 Jur. N. S. 1002.

[3] Hylton *v.* Hylton, 2 Ves. 547; Dawson *v.* Massey, 1 B. & B. 229; see Steadman *v.* Palling, 3 Atk. 423; Mellish *v.* Mellish, 1 Sim. & St. 138; Revett *v.* Harvey, *ib.* 502; Matthew *v.* Brise, 14 Beav. 345; Espey *v.* Lake, 10 Ha. 260.

[4] Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252; see Archer *v.* Hudson, 15 L. J. Ch. 211.

[5] Hylton *v.* Hylton, 2 Ves. 547, 549; see Beasley *v.* Magrath, 2 Sch. & Lef. 35; Ross *v.* Steele, 1 Ir. Eq. 171.

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* Lee *v.* Fox, 6 Dana, 71; Johnson *v.* Johnson, 5 Ala. 90; Fish *v.* Miller, 1 Hoff. Ch. 267; Rapalie *v.* Moreworthy, 1 Sandf. Ch. 399; Brewer *v.* Vanarsdale, 6 Dana, 204; Richardson *v.* Linney, 7 B. Mon. 571; Sherry *v* Stansbury, 3 Md. 320.

† Williams *v.* Powell, 1 Ired. Eq. 460; Gale *v.* Wells, 12 Barb. 84; Waller *v.* Armistead, 2 Leigh, 11; Wright *v.* Arnold, 14 B. Mon. 638. A release freely and fairly given without misrepresentation, or undue influences is valid. Kirby *v.* Taylor, 6 Johns. Ch. 242; Kirby *v.* Turner, 1 Hopk 309; Southall *v.* Clark, 3 Stew. & Port. 338; Myers *v.* Rives, 11 Ala. 760.

the relation of guardian and ward should exist in perfect strictness of terms, or that the guardian should be a guardian appointed by the Court of Chancery, or nominated by the father. If the young person lives with, and is brought up or under the care, influence, and control of a near relative of mature age—if the relation of guardian and ward thus subsist between them—the principle is equally applicable.[1] *

The principle applies to the case of a third party who makes himself a party with the guardian who obtains a security from his ward.[2]

The case of parent and child comes within the same principle.[3] The influence which a parent has naturally over a child makes it the duty of the court to watch over and protect the interests of the child. A child may deal with or make a gift to a parent, and such dealing or gift is good, if it be not tainted with parental influence, operating on the hopes or fears or necessities of the child. A child is presumed to be under parental influence, as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent upholding the transaction or maintaining the gift to disprove the exercise of parental influence by showing that the child was really a free agent, and had competent independent advice, or had at least competent means of forming an independent judgment, and fully understood what he was doing and was desirous of doing it.[4] † The principle applies for at

[1] Beasley *v.* Magrath, 2 Sch. & Lef. 31; Revett *v.* Harvey, 1 Sim. & St. 502; Mulhallen *v.* Marum, 3 Dr. & War. 317; Archer *v.* Hudson, 15 L. J. Ch. 211; Allfrey *v.* Allfrey, 1 Mac. & G. 98; Espey *v.* Lake, 10 Ha. 260, 262; Llewellin *v.* Cobbold, 1 Sm. & G. 376; Prideaux *v.* Lonsdale, 1 D. J. & S. 433.

[2] Espey *v.* Lake, 10 Ha. 260.

[3] Casborne *v.* Barsham, 2 Beav. 76.

[4] Carpenter *v.* Heriot, 1 Ed. 338;

* Waller *v.* Armistead, 2 Leigh, 11; Hanna *v.* Spotts, 5 B. Mon. 362; Willman *et al.* Appeal, 28 Penn. 376.

† The presumption is that the advancement of the interest of the child was the object in view, and the deed is not *prima facie* void. It is

least a year after the coming of age of the child, and will extend beyond the year, if the dominion lasts.[1] The court will indeed presume the continuance of the influence, unless there is a distinct evidence of its determination.[2] Where the parental influence is disproved or that influence has ceased, a dealing between parent and child, or a gift from a child to a parent, stands on the same footing as any other dealing or gift.[3] The entreaty of a sick father to a child does not amount to undue influence.[4] Nor is the mere fact of a daughter soon after coming of age voluntarily giving securities to a creditor of her father in payment of his debts of itself ground for imputing undue influence to the father.[5]

Transactions between parent and child which proceed upon arrangements between them for the settlement of the family property, or which tend to the peace and security of the family and the avoidance of litigation, do not come within

Heron *v.* Heron, 2 Atk. 160; Young *v.* Peachey, *ib.* 254; Rhodes *v.* Cook, 4 L. J. Ch. 149; Casborne *v.* Barsham, 2 Beav. 76; Hoghton *v.* Hoghton, 15 Beav. 278; Hartopp *v.* Hartopp, 21 Beav. 259; Baker *v.* Bradley, 7 D. M. & G. 597; Wright *v.* Vanderplank, 8 D. M. & G. 135, 146; Bury *v.* Oppenheim, 26 Beav. 594; Savery *v.* King, 5 H. L. 627, 655; Jenner *v.* Jenner, 2 D. F. & J. 359; Davies *v.* Davies, 4 Giff. 417; Berdoe *v.* Dawson, 34 Beav. 603; Chambers *v.* Crabbe, *ib.* 457; Potts *v.* Surr, *ib.* 543; Beale *v.* Billing, 13 Ir. Ch. 250.

[1] 7 H. L. 722, per Lord Cranworth. See Walker *v.* Symonds, 3 Sw. 1, 72; Hoghton *v.* Hoghton, 15 Beav. 300; Wright *v.* Vanderplank, 8 D. M. & G. 135; Bury *v.* Oppenheim, 26 Beav. 594; Warde *v.* Dickson, 5 Jur. N. S. 699; Davies *v.* Davies, 4 Giff. 417; Berdoe *v.* Dawson, 34 Beav. 603; Chambers *v.* Crabbe, *ib.* 457; but see Thornber *v.* Sheard, 12 Beav. 589.

[2] Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252.

[3] Wright *v.* Vanderplank, 8 D. M. & G. 135, 146; Bury *v.* Oppenheim, 26 Beav. 594.

[4] Farrent *v.* Blanchford, 1 D. J. & S. 107.

[5] Thornber *v.* Sheard, 12 Beav. 589, see as to undue influence, *infra*, p. 184.

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the duty, however, of courts of equity carefully to watch and examine the circumstances attending transactions of this kind to discover if any undue influence has been exercised in obtaining the conveyance. Jenkins *v.* Pye, 12 Pet. 241; Taylor *v.* Taylor, 8 How. 183.

The impulse of filial duty and affection will be deemed a satisfactory consideration for a deed in instances only in which the motives are shown to have been free and unconstrained in their operation. Taylor *v.* Taylor, 8 How. 183.

the ordinary rules of the court with respect to parental influence. If the settlement is one by which the parent acquires no benefit, not already possessed by him, and be a reasonable arrangement and for the benefit of the family, and be not obtained through misrepresentation or suppression of the truth, it will be supported even although it may appear that the parent did exert parental influence and authority over the son to procure his execution of it. If the child is fully aware of the nature and effect of the transaction, it is of no consequence that he may not have had the advice of a separate solicitor; nor can he be heard to say that he executed the settlement with precipitancy. If the settlement be for the benefit of the family, a court of equity will not inquire into the degree of influence which may have been exerted.[1] Arrangements between members of a family to assist their several objects or relieve their several necessities, are affected by so many peculiar considerations and are influenced by so many different motives that they are withdrawn from the ordinary rules by which the court is guided in adjudicating between other parties.[2] The court does not minutely weigh the considerations on one side or the other. Even ignorance of rights may not avail to impeach the transaction. But transactions in the nature of a bounty from a child to a parent soon after coming of age, are viewed by the court with jealousy.[3] If the parent gains some advantage by the transaction which he did not previously possess, the general principles with respect to parental influence apply, and the transaction cannot be supported, unless it can be shown that the child

[1] Tweddell *v.* Tweddell, T. & R. 1; Bellamy *v.* Sabine, 2 Ph. 425; Cooke *v.* Burtchaell, 2 Dr. & War. 165; Wallace *v.* Wallace, *ib.* 452; Hoghton *v.* Hoghton, 15 Beav. 278, 305; Baker *v.* Bradley, 7 D. M. & G. 597; Dimsdale *v.* Dimsdale, 3 Drew. 556; Jenner *v.* Jenner, 2 D. F. & J. 354; Potts *v.* Surr, 34 Beav. 543; Williams *v.* Williams, L. R. 2 Ch. App. 295.

[2] Bellamy *v.* Sabine, 2 Ph. 425; Head *v.* Godlee, Johns. 536.

[3] Baker *v.* Bradley, 7 D M. & G. 620.

knew what he was doing and was desirous of doing it, and was not unduly influenced by his father.[1] The same considerations apply where a third person takes a benefit under a deed executed by a son in favor of his father.[2]

If, however, the person who takes the benefit is a member of the family, and the parent himself takes no benefit, the transaction will not be set aside, even though considerable pressure may have been used by the parent to induce the son to execute it. In Wycherley *v.* Wycherley,[3] where the father of a family, with some warmth of temper, insisted upon a deed being executed by a son for the benefit of his two sisters, Lord Northington would not set it aside.[4]

The principles which govern the case of dealings of persons standing in a fiduciary relation apply as between partners,[5]* between principal and surety,[6] and generally to the case of persons who clothe themselves with a character which brings them within the range of the principle.[7] A man who possesses the confidence of another will not be allowed by a court

[1] Heron *v.* Heron, 2 Atk. 160; Hoghton *v.* Hoghton, 15 Beav. 278; Baker *v.* Bradley, 7 D. M. & G. 620; Savery *v.* King, 5 H. L. 627; see Rogers *v.* Bruce, Beat. 486; Rhodes *v.* Cooke, 4 L. J. Ch. 149; Wallace *v.* Wallace, 3 Dr. & War. 452; Jenner *v.* Jenner, 2 D. F. & J. 359; Potts *v.* Surr. 34 Beav. 543; Berdoe *v.* Dawson, *ib.* 603.

[2] Berdoe *v.* Dawson, *ib.* See Sercombe *v.* Saunders, *ib.* 382.

[3] 2 Eden, 175.

[4] Bentley *v.* Mackay, 31 Beav. 151.

[5] Bayne *v.* Ferguson, 5 Dow. 151; Burton *v.* Wookey, 6 Madd. 367; Maddeford v. Austwick, 1 Sim. 89, 2 M. & K. 279; Spittal *v.* Smith, Taml. 45; Chambers *v.* Howell, 11 Beav. 8; Bentley *v.* Craven, 18 Beav. 75; Maclure v. Ripley, 2 Mac. & G. 274; Blissett *v.* Daniel, 10 Ha. 538; Clegg *v.* Edmondson, 8 D. M. & G. 807; Clements *v.* Hall, 2 D. & J. 173; Perens *v.* Johnson, 3 Sm. & G. 419; comp. Knight *v.* Marjoribanks, 11 Beav. 322.

[6] See Reed *v.* Norris, 2 M. & C. 361; Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252.

[7] Tate *v.* Williamson, L. R. 2 Ch. App. 55. See Greenlaw *v.* King, 5 Jur. 18; Giddings *v.* Giddings, 3 Russ. 241; Waters *v.* Bailey, 2 Y. & C. C. C. 219; Tanner *v.* Elworthy, 4 Beav. 487; Smith *v.* Kay, 7 H. L. 750; Coulson *v.* Allison, 2 D. F. & J. 521; Prideaux *v.* Lonsdale, 1 D. J. & S. 433, *supra*, p. 152.

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* Flagg *v.* Mann, 2 Sumner, 486; Simmons *v.* Vulcan Oil Co. 61 Penn. 202; Short *v.* Stevenson, 63 Penn. 95.

The rule does not apply to dealings that are not within the scope of the partnership business. Wheeler *v.* Sage, 1 Wall. 518.

of equity to take advantage of that situation, although the relation of solicitor and client, or principal and agent, be not strictly constituted between them. It is enough that a man be merely consulted as a confidential friend.[1] It is immaterial that no definite relation may exist between the parties.[2] *

The principle on which a court of equity acts in relieving against transactions on the ground of inequality of footing between the parties, is not confined to cases where a fiduciary relation can be shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one man over another, and applies to every case where influence is acquired and abused or where confidence is reposed and betrayed.[3] In cases where a fiduciary relation does not subsist between the parties, the court will not, as it does where a fiduciary relation subsists, presume confidence put and influence exerted: the confidence and the influence must, in such cases, be proved extrinsically, but when they are proved extrinsically, the rules of equity are just as applicable in the one case as in the other.[4]

No general rule can be laid down as to what shall constitute undue influence. The question is one which must in each case depend on its own particular circumstances. There is no head of equity more difficult of application than the avoidance of a transaction on the ground of advantage taken of

[1] Taylor *v.* Obee, 3 Pri. 83; see Darley *v.* Singleton, Wight. 25.

[2] *Ib.*; Butler *v.* Miller, L. R. 1 Ir. Eq. 215.

[3] Huguenin *v.* Basley, 14 Ves. 273, 286; Dent *v.* Bennett, 4 M. & C. 269; Cooke *v.* Lamotte, 15 Beav. 234; Billage *v.* Southee, 9 Ha. 534, 540; Williams *v.* Bayley, L. R. 1 App. Ca. 200; Smith *v.* Kay, 7 H. L. 750, 779, *per* Lord Kingsdown; Wyse *v.* Lambert, 16 Ir. Ch. 379; Rhodes *v.* Bate, L. R. 1 Ch. App. 252.

[4] 7 H. L. 779, *per* Lord Kingsdown; see Casborne *v.* Barsham, 2 Beav. 76; Boyse *v.* Russborough, 3 Jur. N. S. 373; Beanland *v.* Bradley, 2 Sm. & G. 339; Harrison *v.* Guest, 6 D. M. & G. 424; Rhodes *v.* Bate, 1 L. R. Ch. Ap. 252; Lyon *v.* Home, 16 W. R. 824.

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* McCormick *v.* Malin, 5 Blackf. 509; Wilson *v.* Watts, 9 Md. 356; Dismukes *v.* Terry, Walk. 197.

distress.[1] The case presents no difficulty where direct restraint, duress, or oppression can be shown.[2] The difficulty arises when the court has to determine whether the advantage taken of distress amounts to oppression,[3] * or the influence exerted has been so pressing as to be undue within the rule of equity.[4] In a case where the holders of forged bills working on the fears of a father for the safety of his son, who had forged them, but without any distinct threat and without any distinct promise not to prosecute, obtained from him a security for the amount of the bills, the transaction was set aside.[5] In a case however where a debtor who was under arrest had given to a creditor, at whose suit he was imprisoned, a warrant of attorney to confess judgment for the whole amount claimed, the court held that the arrangement having been entered into deliberately, with full knowledge of the circumstances and with professional advice, was not impeachable, although one of the debts for which the warrant of attorney was given was barred

[1] Ramsbottom *v.* Parker, 6 Madd. 6.

[2] Nicholls *v.* Nicholls, 1 Atk. 409; Roy *v.* Duke of Beauford, 2 Atk. 190; Thornhill *v.* Evans, *ib.* 330; Talleyrand *v.* Boulanger, 3 Ves. 448; Lamplugh *v.* Lamplugh, 1 Dick. 411; Gubbins *v.* Creed, 2 Sch. & Lef. 214; Underhill *v.* Harwood, 10 Ves. 219; Pickett *v.* Loggan, 14 Ves. 215; Peel *v.* ——, 16 Ves. 157; Middleton *v.* Middleton, 1 J. & W. 94.

[3] Ramsbottom *v.* Parker, 6 Madd. 6.

[4] Middleton *v.* Sherburne, 4 Y. & C. 389; Boyse *v.* Russborough, 3 Jur. N. S. 373; Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252. The civil law always sets aside a contract procured by force, or from a want of liberty in the contracting party. It was said in the Pandects that the party must be intimidated by the apprehension of some serious evil of a present or pressing nature, and such as is capable of making an impression upon a person of courage. Pothier, however, thinks this rule too strict, and that regard should be had to the age, sex, and condition of the party, and that a fear which would not be deemed sufficient to have influence on a man in the prime of life, might be sufficient in respect of a woman, or a man in the decline of life. Obl. p. 1, c. 1, art. 3, §. 2, p. 25.

[5] Williams *v.* Bayley, L. R. 1 App. Ca. 200; see Nicholls *v.* Nicholls, 1 Atk. 409; Scott *v.* Scott, 11 Ir. Eq. 74.

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* Butler *v.* Haskell, 4 Dessau. 651; Kenny *v.* Udall, 5 Johns. Ch. 464; Stewart *v.* Stewart, 7 J. J. Marsh. 183; Lyon *v.* Talmadge, 14 Johns. 501; Driver *v.* Fortune, 5 Port. 9; Hough *v.* Hunt, 2 Ohio, 435; Esham *v.* Lamar, 10 B. Mon. 43; Central Bank *v.* Copeland, 18 Md. 305; Hunt *v.* Bass, 2 Dev. Eq. 292; Davis *v.* Morgan, 1 Dana, 20; Tate *v.* Whitney, Harring's Ch. 145; Kelsey *v.* Hobby, 16 Pet. 269.

by the Statute of Limitations.[1] The court is bound to examine carefully into a contract entered into with a party who is in gaol, and to see that no undue advantage has been taken of his position. But it is not true, as a general principle, that a man in insolvent circumstances and in prison can not sell his property.[2]

In charging a jury, with respect to what shall constitute undue influence in the making of a will, Mr. Justice Wilde said as follows, in a very late case :[3]* "To make a good will a man must be a free agent, but all influences are not unlawful. Persuasion appeals to the affections, or ties of kindred, to a sentiment of gratitude for past services or pity for future destitution or the like. These are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has not the courage to resist; moral command asserted and yielded for the sake of peace and quiet, or of escaping from distress of mind or social discomfort; these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word a testator may be led, not driven, and his will must be the offspring of his own volition and not that of another."[4]

[1] Richards *v.* Curlewis, 3 Eq. Rep. 278; see Hinton *v.* Hinton, 2 Ves. 634; Roy *v.* Duke of Beaufort, 2 Atk. 193; Knight *v.* Marjoribanks, 11 Beav. 322, 2 Mac. & G. 10; Scott *v.* Scott, 11 Ir. Eq. 74; comp. Falkner *v.* O'Brien, 2 Ba. & Be. 220; Wilkinson *v.* Stafford, 1 Ves. Jr. 43.

[2] Brinkley *v.* Hann, 1 Dru. 175; see Parker *v.* Clarke, 30 Beav. 54.

[3] Hall *v.* Hall, 18 L. T. N. S. 153; 37 L. J. Ch. 24; L. R. Pr. & Div. 482.

[4] See Farrent *v.* Blanchford, 1 D. J. & S. 121.

* Davis *v.* Calvert, 5 G & J. 269; Gardiner *v.* Gardiner, 34 N. Y. 155;

Mere inadequacy of consideration or inequality in a bargain is not a ground to set aside a transaction, if the parties were on equal terms and in a situation to judge for themselves, and performed the act wittingly and willingly.[1]* Mere inade-

[1] Gartside *v.* Isherwood, 1 Bro. C. C. 559; Griffith *v.* Spratley, 1 Cox, 383; Collier *v.* Brown, *ib.* 428; Fox *v.* Macreth, 2 Cox, 322; Murray *v.* Palmer, 2 Sch. & Lef. 488; Copis *v.* Middleton, 2 Madd. 409; Wood *v.* Abrey, 3 Madd. 417; Meredith *v.* Saunders, 2 Dow. 514; Curzon *v.* Belworthy, 3 H. L. 742; Harrison *v.* Guest, 6 D. M. & G. 434, 8 H. L. 481.

Tyler *v.* Gardiner, 35 N. Y. 559; Turner *v.* Cheeseman, 2 McCarter, 243; Moore *v.* Blauvelt, 2 McCarter, 367; Hall *v.* Hall, 38 Ala. 131.

* Butler *v.* Haskell, 4 Dessau. 651; Eyre *v.* Potter, 15 How. 42; Bareibeau *v.* Brant, 17 How. 43; Farnam *v.* Brooks, 9 Pick. 212; Steele *v.* Worthington, 2 Ohio, 352; Wintermute *v.* Snyder, 2 Green's Ch. 489; Bedel *v.* Loomis, 11 N. H. 9; Cubbins *v.* Markwood, 13 Gratt. 495; Erwin *v.* Parham, 12 How. 197.

It has been left, perhaps, wisely, to the experience of the courts of justice to apply the great principles of equity to each case according to its particular circumstances, and thus gradually to form a practical system of pure justice. And the courts have never decided, as a broad principle, that mere inadequacy of price, unconnected with direct fraud or imposition, or concealment, or advantage taken of extreme weakness or great necessity, should be a distinct and independent ground for vitiating contracts. But the courts have said that the inadequacy may be so gross as to furnish strong and even conclusive presumption of fraud, and that is the way the grossness or inadequacy may avoid the sale. Wherever the courts perceive that a sale of property has been made at a grossly inadequate price such as would shock a correct mind, this inadequacy furnishes a strong and in general a conclusive presumption, though there is no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the necessity and distress of the vendor; and this imposes upon the purchaser the necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct. The relief is extended not only to young heirs selling their expectancies, but to all who are weak, or necessitous, or not perfectly conusant of their rights, whether selling expectancies or absolute estates, more especially where the purchaser is very intelligent and acute, and avails himself of his superiority in an unreasonable manner. Butler *v.* Haskell, 4 Dessau. 651.

When the smallness of the price is due to the fault of the vendor, the sale is valid. Forde *v.* Herron, 4 Munf. 316.

The inadequacy of the price given at the sale of land for unpaid taxes

quacy of consideration is not a ground for refusing specific performance of an unexecuted contract, and still less can it be ground for rescinding an executed contract.[1] But inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for canceling a transaction. In such cases the relief is granted not on the ground of the inadequacy of consideration, but on the ground of fraud as evidenced thereby.[2*] In determining

[1] Collier *v.* Brown, 1 Cox, 428; Coles *v.* Trecothick, 9 Ves. 246, Callaghan *v.* Callaghan, 8 Cl. & Fin. 401; Bower *v.* Cooper, 2 Ha. 408; Borell *v.* Dann, *ib.* 450, *per* Wigram, V.-C.; Abbott *v.* Sworder, 4 Deg. & Sm. 456; comp. Barnardiston *v.* Lingood, 2 Atk. 134; Falcke *v.* Gray, 4 Drew. 651. There was till very recently a well recognized distinction between sales of estates in possession and estates in reversion. The sale of an estate in reversion, if effected by private contract, was liable to be set aside at any time afterwards for mere inadequacy of consideration, and the *onus probandi* did not, as in ordinary cases, rest with the plaintiff seeking to impeach the rule, but with the defendant upholding it. Davis *v.* Duke of Marlborough, 2 Sw. 151; Gowland *v.* De Faria, 17 Ves. 20; Earl of Aldborough *v.* Trye, 7 Cl. & Fin. 456; Edwards *v.* Burt, 2 D. M. & G. 55; Bromley *v.* Smith, 26 Beav. 644; Talbot *v.* Staniforth, 1 J. & H. 484. But it has been enacted by 31 Vict. c. 4 that no purchase made *bona fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall be hereafter opened or set aside merely on the ground of undervalue.

[2] Gwynne *v.* Heaton, 1 Bro. C. C. 9; Gartside *v.* Isherwood, *ib.* 559; Heathcoate *v.* Paignon, 2 Bro. C. C. 173; Evans *v.* Llewellin, 1 Cox, 333; Gibson *v.* Jeyes, 6 Ves. 266, 273; Underhill *v.* Horwood, 10 Ves. 209, 219; Morse *v.* Royal, 12 Ves. 373; Wood *v.* Abrey, 3 Madd. 417; Blakeney *v.* Baggott, 1 Dow & Cl. 405; Stillwell *v.* Wilkins, Jac. 282; Borell *v.* Dann, 2 Ha. 440, 450; Rice *v.* Gordon, 11 Beav. 265; Cockell *v.* Taylor, 15 Beav. 103, 115; Falcke *v.* Gray, 4 Drew. 651; Summers *v.* Griffiths, 35 Beav. 27; Butler *v.* Miller, L. R. 1 Ir. Eq. 210.

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thereon does not constitute a valid objection to the sale. Slater *v.* Maxwell, 6 Wall. 268.

* Butler *v.* Haskell, 4 Dessau. 651; McCormick *v.* Malin, 5 Blackf. 509; Eyre *v.* Potter, 15 How. 43; Veazie *v.* Williams, 8 How. 134; Wright *v.* Stannard, 2 Brock. 312; Green *v.* Thompson, 2 Ired. Eq. 365; Newman *v.* Meek, 1 Freeman's Ch. 441; White *v* Flora, 2 Overton, 426; Hardeman *v.* Berge, 10 Yerg. 202; Knobb *v.* Lindsay, 5 Ohio, 468; Osgood *v.* Franklin, 2 Johns. Ch. 1; Stubblefield *v.* Patterson, 3 Hey. 128; Jouzin *v.* Toulmin, 9 Ala. 662; Baker *v.* Howell, 4 Johns. Ch. 118.

The qualification to the rule implies necessarily the affirmation that if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud. Byers *v.* Surget, 19 How. 303; Wright *v.* Wilson, 2 Yerg. 294; Barnett *v.* Spratt, 4 Ired. Eq. 171; Deaderick *v.* Watkins,

whether the consideration is or is not adequate, it must always be remembered that there are fancy prices not regulated by intrinsic value.[1]

By the civil law a sale for one half the value might be set aside for inadequacy.[2] If the price given was less than one-

[1] Abbott *v.* Sworder, 4 Deg. & Sm. 456.

[2] Nott *v.* Hill, 2 Ch. Ca. 120; *per* Lord Nottingham; How *v.* Weldon, 2

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8 Humph. 520; Morris *v.* Philiber, 30 Mo. 145; Hardeman *v.* Burge, 10 Yerg. 202.

Inadequacy of price within itself, and disconnected from all other facts, can not be a ground for setting aside a contract, or affording relief against it. What this something besides inadequacy should be, perhaps no court ought to say, lest the cunning and the wary, by employing other means than those named, should escape with their fraudulent gains. It ought, however, in connection with the inadequacy of consideration, to induce the belief that there has been either a suppression of the truth, the suggestion of falsehood, abuse of confidence, or violation of duty arising out of some fiduciary relation between the parties, the exercise of undue influence, or the taking of an unjust or inequitable advantage of one whose peculiar situation at the time would be calculated to render him an easy prey for the cunning and artful. But if no one of these appear, or if no fact is proved, that will lead the mind to the conclusion that the party against whom relief is sought has suppressed some fact that he ought to have disclosed, or that he has suggested some falsehood, or abused in some manner the confidence reposed in him, or that some fiduciary relation existed between the parties, or that the party complaining was under his influence, or at the time of the transaction was in a condition, from any cause, an easy victim to the unconscientious, then relief can not be afforded. Judge *v.* Wilkins, 19 Ala. 765.

Whenever equity interferes with a contract, or refuses its aid to carry it into execution for inadequacy of consideration, it is on the ground of fraud which must either be clearly proved, or result irresistibly at the first view, and without calculation from the grossness of the disparity. Steele *v.* Worthington, 2 Ohio, 352; Hardeman *v.* Burge, 10 Yerg. 202.

An entire failure of consideration by the receipt of what is a mere bubble, may be the ground for rescinding a contract. Warner *v.* Daniels, 1 Wood. & Min. 90.

The fact that the sale was made under judicial process weakens, but does not absolutely remove the presumption of fraud arising from great inadequacy. Byers *v.* Surget, 19 How. 303; s. c. 1 Hemp. 715.

Inadequacy of price is no ground for setting aside a sale at auction. Newman *v.* Meek, 1 Freem. Ch. 441; Haines *v.* Coales, 1 Dev. Eq. 420.

half the value, the inequality was deemed by the civil law *læsio* and relief was afforded. There is however no rule in our own law as to what difference between the real value of property and the consideration given constitutes inadequacy of price. This the judge must decide.[1]* In most cases, however, perhaps a sale at half price might be sufficient to induce the court to set aside a transaction, if there is no ground for suggesting that bounty was intended.[2] When bounty is intended, there is no room for the inference of fraud from the inadequacy of the price; love and affection will alone support the conveyance without any pecuniary consideration, and will equally support it where there is a pecuniary consideration wholly inadequate to the value of the property.[3]

The fact that a transaction may have been improvident or precipitate, or may have been entered into without independent professional advice, is as immaterial as mere inadequacy of consideration, if the parties were on equal terms and in a situation to act and judge for themselves, and fully understood the nature of the transaction, and no evidence can be adduced of the exercise of undue influence or oppression.[4]† But inadequacy of consideration or the absence of independent professional advice becomes a most material circumstance where one of the parties to a transaction is from age, ignorance, distress, incapacity, weakness of mind, body, or dis-

Ves. 516; Day *v.* Newman, 2 Cox, 80; Burrowes *v.* Lock, 10 Ves. 474, *per* Sir W. Grant.

[1] See Nott *v.* Hill, 2 Ch. Ca. 120; Butler *v.* Miller, L. R. 1 Ir. Eq. 194; but see 2 Madd. 421 n.

[2] Butler *v.* Miller, L. R. 1 Ir. Eq. 194.

[3] Whalley *v.* Whalley, 1 Mer. 446.

[4] Meredith *v.* Saunders, 2 Dow. 514; Blackie *v.* Clark, 15 Beav. 595; Harrison *v.* Guest, 6 D. M. & G. 434, 8 H. L. 481; Denton *v.* Donner, 23 Beav. 291; Toker *v.* Toker, 31 Beav. 629, 32 L. J. Ch. 322.

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* Butler *v.* Haskell, 4 Dessau. 651; Wild *v.* Rees, 48 Ill. 428; Westervelt *v.* Matheson, 1 Hoff. Ch. 37.

† Green *v.* Thompson, 2 Ired. Eq. 365; Dunn *v.* Chambers, 4 Barb. 376; Jouzin *v.* Toulmin, 9 Ala. 662.

position, or from humble position or other circumstances, unable to protect himself. In all such cases, whatever be the nature of the transaction, the *onus* of proof rests on the party who seeks to uphold it to show that the other performed the act or entered into the transaction voluntarily and deliberately, knowing its nature and effect, and that his consent to perform the act or become a party to the transaction was not obtained by reason of any undue advantage taken of his position or of any undue influence exerted over him.[1]* The mere fact, however, that one of the parties may be an illiterate person or a man of advanced age, or may be in bad health, or in distress, or pecuniary embarrassment, will not vitiate a transaction, even although it may have been founded on an inadequate consideration, and no independent advice may have been had, if it appear on the face of the evidence that he was fully competent to form an independent judgment in the matter, and became a party to the transaction deliberately and advisedly, knowing its nature and effect. The *onus* rests on the party

[1] Ardglasse *v.* Muschamp, 1 Vern. 236; Clarkson *v.* Hanway, 2 P. Wms. 203; Proof *v.* Hines, Forrest, 111; How *v.* Weldon, 2 Ves. 516; Gartside *v.* Isherwood, 1 Bro. C. C. 559; Evans *v.* Llewellin, 1 Cox, 333; Murray *v* Palmer, 2 Sch. & Lef. 486; Morse *v.* Royal, 12 Ves. 373; Pickett *v.* Loggan, 14 Ves. 231; Falkner *v.* O'Brien, 2 Ba. & Be. 220; Griffith *v.* Robbins, 3 Madd. 191; Wood *v.* Abrey, *ib.* 417; Willan *v.* Willan, 2 Dow. 274; Collins *v.* Hare, 2 Bligh's N. S.106; M'Diarmid *v.* M'Diarmid, 3 Bligh's N. S. 374; Williams *v.* Smith, 7 L. J. Ch. 129; Bowen *v.* Kirwan, Ll. & G. 47; Dent *v.* Bennett, 4 M. & C. 273; Ahearne *v.* Hogan, Dru. 310; Garvey *v.* M'Minn, 9 Ir. Eq. 526; Gibson *v.* Russell, 2 Y. & C. C. C. 104; Sturge *v.* Sturge, 12 Beav. 244; Cockell *v.* Taylor, 15 Beav. 115; Cooke *v.* Lamotte, *ib.* 234; Longmate *v.* Ledger, 2 Giff. 157; Grosvenor *v.* Sherratt, 28 Beav. 659; Smith *v.* Kay, 7 H. L. 750; Prideaux *v.* Lonsdale, 1 D. J. & G. 433; Summers *v.* Griffith, 35 Beav. 27; Rhodes *v.* Bate, L. R. 1 Ch. App. 252; Tate *v.* Williamson, L. R. 2 Ch. App. 65.

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* Neely *v.* Anderson, 2 Strobh. Eq. 262; Maddox *v.* Simmons, 31 Geo. 512; Wormack *v.* Rogers, 9 Geo. 60; Mann *v.* Betterly, 21 Vt. 326; Holmes *v.* Fresh, 9 Mo. 201; George *v.* Richardson, Gilmer, 230; Hawley *v.* Cramer, 4 Cow. 717; Hall *v.* Perkins, 3 Wend. 626; Howard *v.* Edgill, 17 Vt. 9; Holden *v.* Crawford, 1 Aik. 390; McKinney *v.* Pinckard, 2 Leigh, 149; Todd *v.* Grove, 33 Md. 188.

impeaching the transaction to show that coercion was used or undue influence was exercised.[1] There can be no title to relief on the ground of advantage taken of distress where the advantage or disadvantage of the transaction is to be the result of future contingencies, and is not within the view of the parties at the time.[2] *

A mere false statement of the consideration does not of itself necessarily vitiate a deed,[3] but there may be cases where a false statement of the consideration may of itself destroy the whole transaction.[4] The general rule is that, where no consideration is expressed in a deed, a party may aver and prove consideration in support of it, and, where a consideration is expressed, a man may still aver other considerations not inconsistent therewith.[5] Where, however, the consideration expressed in a deed is impeached on the ground of fraud, the party claiming under the deed cannot aver in its support considerations different from that expressed.[6] If the transaction on which a deed purports to be founded and the consideration for which it was executed, appear to be untruly stated, the instrument may, if the untruth would operate fraudulently, lose all its binding quality in equity even though it be conclusive at law.[7] If a deed states on its face a pecuniary consideration, a party cannot, if it be impeached, set up con-

[1] Lewis *v.* Pead, 1 Ves. Jr. 19; Leym *v.* Home, 16 W. R. 824; M'Neill *v.* Cahill, 2 Bligh, 228; Pratt *v.* Barker, 1 Sim. 1; Hunter *v.* Atkins, 3 M. & K. 113; Purdie *v.* Millett, Taml. 31; Richards *v.* Curlewis, 3 Eq. Rep. 278; Curzon *v.* Belworthy, 3 H. L. 742; Harrison *v.* Guest, 6 D. M. & G. 434, 8 H. L. 481; see Hovenden *v.* Lord Annesley, 2 Sch. & Lef. 607, 639; Price *v.* Price, 1 D. M. & G. 308; but see Cooke *v.* Lamotte, 15 Beav. 234. Comp. Murray *v.* Palmer, 2 Sch. & Lef. 486.

[2] Ramsbottom *v.* Parker, 6 Madd. 6.

[3] Bowen *v.* Kirwan, Ll. &. G. 47.

[4] *Ib.* Uppington *v.* Bullen, 2 Dr. & War. 184; Gibson *v.* Russell, 2 Y. & C. C. C. 104.

[5] Hartopp *v.* Hartopp, 17 Ves. 192; Clifford *v.* Turrell, 1 Y. & C. C. C. 138, affd. 14 L. J. Ch. 39; Nixon *v.* Hamilton, 2 Dr. & Wal. 387, and cases cit. 2 P. Wms. 204.

[6] Clarkson *v.* Hanway, 2 P. Wms. 203; Bridgman *v.* Green, 2 Ves. 627; Watt *v.* Grove, 2 Sch. & Lef. 501; Willan *v.* Willan, 2 Dow. 274.

[7] Watt *v.* Grove, 2 Sch. & Lef. 501.

* Farnam *v.* Brooks, 9 Pick. 212; White *v.* Flora, 2 Overton, 426.

siderations of blood or natural love and affection.[1] Where, however, the recitals stated a pecuniary consideration as the foundation of a deed, and, in the operative part, love and affection were introduced as being partly the consideration on which the deed was founded, the court would not, from this circumstance alone, presume fraud.[2]

In dealings between parties, one of whom is subject to the influence of the other, there must be upon the face of the deed itself a fair and correct statement of the transaction. If the statement as to the consideration is not true, the transaction cannot be supported. A consideration partly of the consideration stated in the deed and partly of something else, is not consistent with the consideration stated on the face of the deed. It is not open to the party who seeks to uphold it to give such evidence to sustain the deed.[3]

The statement of consideration where there was in fact none, or the untrue statement of the consideration or other circumstances of a suspicious nature, may be sufficient to shift the burthen of proof from the party impeaching a deed upon the party upholding it.[4]

The jurisdiction of the court in relieving against transactions on the ground of undue influence has been exercised as between a medical man and a patient;[5] as between the keeper of a lunatic asylum and a patient under his care;[6] as between a minister of religion and a person under his spiritual influ-

[1] Clarkson *v.* Hanway, 2 P. Wms. 203; Willan *v.* Willan, 2 Dow. 282.

[2] Filmer *v.* Gott, 4 Bro. P. C. 230; Whalley *v.* Whalley, 3 Bligh, 13.

[3] Ahearne *v.* Hogan, Dru. 310; Uppington *v.* Bullen, 2 Dr. & War. 184; Clifford *v.* Turrell, 1 Y. & C. C. C. 138; Gibson *v.* Russell, 2 Y. & C. C. C. 104.

[4] Watt *v.* Grove, 2 Sch. & Lef. 492, 502; Griffiths *v.* Robbins, 3 Madd. 191; Gibson *v.* Russell, 2 Y. & C. C. C. 104; Ahearne *v.* Hogan, Dru. 310. See Harrison *v.* Guest, 6 D. M. & G. 434, 8 H L. 481.

[5] Dent *v.* Bennett, 4 M. & C. 269, Ahearne *v.* Hogan, Dru. 310; Gibson *v.* Russell, 2 Y. & C. C. C. 104; Peacock *v.* Kernot, 8 L. T. 292; Allen *v.* Davis, 4 Deg. & Sm. 133; Billage *v.* Southee, 9 Ha. 540. See Pratt *v.* Parker, 4 Russ. 507; Popham *v.* Brooke, 5 Russ. 9; Blackie *v.* Clarke, 15 Beav. 595; Farler *v.* Lane, 29 L. T. 2.

[6] Wright *v.* Proud, 13 Ves. 136.

ence;[1] as between a spiritualist medium and an old lady;[2] as between a young man in the army, just come of age, and his superior officer;[3] as between husband and wife;[4] as between a man and a lady to whom he was about to be married;[5] as between a man and a woman with whom he was living;[6] as between brother and sister;[7] as between two brothers;[8] as between an elder and a younger brother just come of age;[9] as between two sisters;[10] as between an uncle and his nephew,[11] who was deaf and dumb;[12] as between an uncle, who was in such a state of bodily and mental imbecility as rendered him incapable of transacting business requiring deliberation and reflection, and a nephew;[13] as between nephew and aunt,[14] or aunt and niece;[15] as between a young man just come of age and a man who had acquired an influence over him during his minority;[16] as between a young man of intemperate habits and a person with whom he was living;[17] as between an unmarried woman and her brother-in-law;[18] as between an old lady and a woman living with her in the

[1] Norton *v.* Relly, 2 Eden, 286; Huguenin *v.* Basley, 14 Ves. 273; Middleton *v.* Sherburne, 4 Y. & C. 358; Whyte *v.* Meade, 2 Ir. Eq. 420; Nottidge *v.* Prince, 2 Giff. 246. Comp. Kirwan *v.* Cullen, 4 Ir. Ch. 322; *re* Metcalfe, 2 D. J. & S. 122. See also Thompson *v.* Heffernan, 4 Dr. & War. 286.

[2] Lyon *v.* Home, 16 W. R 824.

[3] Lloyd *v.* Clarke, 6 Beav. 309.

[4] Lambert *v.* Lambert, 2 Bro. P. C. 18; Peel *v.* ——, 16 Ves. 157; Price *v.* Price, 1 D. M. & G. 308; Boyse *v.* Russborough, 3 Jur. 373; Proctor *v.* Robinson, 35 Beav. 335. See Nedby *v.* Nedby, 5 Deg. & S. 377; Coulson *v.* Allison, 2 D. F. & J. 521.

[5] Page *v.* Horne, 11 Beav. 227, 235 Cobbett *v.* Brock, 20 Beav. 525.

[6] Coulson *v.* Allison, 2 D. F. & J. 521. See Farmer *v.* Farmer, 1 H. L. 724; Garvey *v.* M'Minn, 9 Ir. Eq 526.

[7] Sharp *v.* Leach, 31 Beav. 491.

[8] Sturge *v.* Sturge, 12 Beav. 229.

[9] Sercome *v.* Saunders, 34 Beav. 382.

[10] Harvey *v.* Mount, 8 Beav. 439.

[11] Tate *v.* Williamson, L. R. 2 Ch. App. 55.

[12] Ferres *v.* Ferres, 2 Eq. Ca. Ab. 695. Comp. Farmer *v.* Farmer, 1 H. L. 724; Vickers *v.* Bell, 9 L. T. N. S. 600.

[13] Willan *v.* Willan, 2 Dow. 274.

[14] Griffiths *v.* Robbins, 3 Madd. 191; Cooke *v.* Lamotte, 15 Beav. 241. See Pratt *v.* Barker, 1 Sim. 1, 4 L. J. Ch. 149; Whalley *v.* Whalley, 3 Bligh, 1; Toker *v.* Toker, 31 Beav. 629, 32 L. J. Ch. 322.

[15] Anderson *v.* Ellsworth, 3 Giff. 154.

[16] Grosvenor *v.* Sherratt, 28 Beav. 661; Smith *v.* Kay, 7 H. L. 750. See Aylw rd *v.* Kearney, 2 B. & B. 468.

[17] Terry *v.* Wacher, 15 Sim. 447.

[18] Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252.

capacity of a companion or domestic;[1] as between a child and an imbecile parent;[2] and in other cases.[3]

The principle upon which the court sets aside transactions on the ground of undue influence only applies to cases where some lawful relation has been constituted between the parties.[4] Where, accordingly, a woman, while living in adultery with a married man, assigned certain property to secure a debt which he owed, the court would not, from the mere existence of the relation presume undue influence, the woman being of mature intelligence, and the transaction having been entered into deliberately.[5]

Transactions even between mortgagor and mortgagee are looked on with jealousy where a mortgagor in embarrassed circumstances, and under pressure, sells the equity of redemption to the mortgagee for a sum considerably less than its value.[6] *

In the application of the principles of the court, there is no distinction between the case of one who himself exercises a direct influence, or of another who makes himself a party with the person who exercises the undue influence.[7]

[1] Cole *v.* Gibson, 1 Ves. 503; Bate *v.* Bank of England, 9 Jur. 545.

[2] Whelan *v.* Whelan, 3 Cow. (Amer.), 538. See Gardner *v.* Gardner, 22 Wend. (Amer.). Comp. Beanland *v.* Bradley, 2 Sm. & G. 339.

[3] Brooks *v.* Gally, 2 Atk. 34; Bell *v.* Howard, 9 Mod. 302; Osmond *v.* Fitzroy, 3 P. W. 129; How *v.* Weldon, 2 Ves. 516; Evans *v.* Llewellin, 1 Cox, 333; Wood *v.* Abrey, 3 Madd. 417; Hudson *v.* Beauchamp, cit. 3 Bligh, 18; Collins *v.* Hare, 2 Bligh's N. S. 106; M'Diarmid *v.* M'Diarmid, 3 Bligh's N. S. 374; Aylward *v.* Kearney, 2 B. & B. 477; D'Arcy *v.* D'Arcy, Hay & J. 115; Longmate *v.* Ledger, 2 Giff. 157; Custance *v.* Cunningham, 13 Beav. 363; Douglas *v.* Culverwell, 31 L. J. Ch. 543; Clark *v.* Malpas, *ib.* 696; Baker *v.* Monk, 10 Jur. N. S. 691; Prideaux *v.* Lonsdale, 1 D. J. & S. 439; Williams *v.* Bauley, L. R. 1 App. Ca. 200; Tate *v.* Williamson, L. R. 1 Eq. 528.

[4] Hargreave *v.* Everard, 6 Ir. Ch. 278.

[5] *Ib.*

[6] Ford *v.* Olden, L. R. 3 Eq. 461. See Webb *v.* Rorke, 2 Sch. & Lef. 661; Hickes *v.* Cooke, 4 Dow. 16.

[7] Ardglasse *v.* Pitt, 1 Vern. 238;

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* Baugher *v.* Merryman, 32 Md. 185; Sheckell *v.* Hopkins, 2 Md. Ch. 90; Dougherty *v.* McColgan, 6 G. & J. 275; Thompson *v.* Lee, 2 Ala. 292; Conway *v.* Alexander, 7 Cranch, 218.

The difficulty of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion is greatly enhanced when the question is one between husband and wife.[1] The presumption of undue influence exercised by a husband over a feeble dying wife is however far stronger than when a similar charge is made against a wife in respect of her deceased husband.[2]

Whether a transaction can be set aside on the ground of undue influence, where the influence has been exercised not by the party obtaining the benefit, but by a third person, appears to be doubtful.[3]

SECTION IV.—FRAUD UPON THIRD PARTIES.

Another class of frauds against which relief may be had in equity is where a contract or other act is substantially a fraud upon the rights, interests, or intentions of third parties. The general rule is that particular persons in contracts and other acts shall not only transact *bonâ fide* between themselves, but shall not transact *malâ fide* in respect to other persons who stand in such a relation to either as to be affected by the contract or the consequences of it.[4] Collusion between two persons to the prejudice or loss of a third is in the eye of the court the same as a fraud.[5]

Espey *v.* Lake, 10 Ha. 260; Wyse *v.* Lambert, 16 Ir. Ch. 379, *supra*, p. 152.

[1] Boyse *v.* Russborough, 3 Jur. N. S. 373, 377. See Price *v.* Price, 1 D. M. & G. 308; Gardner *v.* Gardner, 22 Wend. (Amer.) 526; Clarke *v.* Sawyer, 3 Sandf. (Amer.) 351. Comp. Middleton *v.* Middleton, 1 J. & W. 94.

[2] Clarke *v.* Sawyer, 3 Sandf. (Amer.) 357.

[3] Bentley *v.* Mackay, 31 Beav. 143. See Wycherley *v.* Wycherley, 2 Eden, 175.

[4] 2 Ves. 156, 157, *per* Lord Hardwicke; Wallis *v.* Duke of Portland, 3 Ves. 502.

[5] Garth *v.* Cotton, 1 Dick. 217.

FRAUD UPON CREDITORS.

A class of frauds[1] coming under the head of fraud upon third parties embraces all those agreements or other acts of parties which tend to delay, deceive, or defraud creditors. Transactions of the sort are void at common law,[2] * but the

[1] Pope *v.* Wilson, 7 Ala. 690.
[2] Cadogan *v.* Kennet, Cowp. 432; Copis *v.* Middleton, 2 Madd. 428; Barton *v.* Vanheythuysen, 11 Ha. 132.

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* The statute must be received as a true and accurate declaration of what the common law was. Clark *v.* Douglass, 62 Penn. 408.

A debtor has the right to pay his debt to an insolvent creditor in order to defeat an attachment which he knows is about to be laid in his hands, and the court will not inquire into the motive which prompted its payment. Simpson *v.* Dall, 3 Wall. 461; Chamberlain *v.* Pillsbury, 35 Vt. 16.

A conveyance by a *femme sole* on the eve of marriage is not fraudulent against her husband's creditors. Prior *v.* Kinney, 6 Munf. 610; Land *v.* Jeffries, 5 Rand. 211.

A conveyance in fraud of one creditor is void as to all creditors. Hoke *v.* Henderson, 2 Dev. 12.

Any agreement entered into by a debtor with a view to deprive his creditors of his future earnings, and enable him to retain and use them for his own benefit and advantage, is fraudulent. Tripp *v.* Childs, 14 Barb. 85.

All conveyances for the use of the grantor are fraudulent and null against creditors. Mackie *v.* Cairns, 1 Hopk. 373; s. c. 2 Cow. 54; Wilson *v.* Cheshire, 1 McCord's Ch. 233; Brown *v.* Donald, 1 Hill's Ch. 297; Jackson *v.* Parker, 9 Cow. 73; Van Wyck *v.* Seward, 18 Wend. 375; Lukin *v.* Aird, 6 Wall. 78; Smith *v.* Smith, 11 N. H. 460.

A conveyance upon trusts of a loose and indefinite nature, and controllable by the grantor, is fraudulent. Burbank *v.* Hammond, 3 Summer 429.

A sale of property by an insolvent debtor for long notes is fraudulent. Pope *v.* Andrews, 1 Smed. & Mar. Ch. 135; Kepner *v.* Burkhart, 5 Barr, 478; Borland *v.* Walker, 7 Ala. 269; Grannis *v.* Smith, 3 Humph. 179; Mitchell *v.* Beal, 8 Yerg. 134.

A deed of articles consumable in their use is void on its face against creditors. Hunter *v.* Foster, 4 Humph. 211; Wade *v.* Green, 3 Humph. 547; Charlton *v.* Leay, 5 Humph. 493; Richmond *v.* Curdup, 1 Meigs, 581.

A judgment voluntarily confessed by an insolvent debtor for more

legislature with the view of affirming the rule and carrying the principles of the common law more fully into effect,

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than is due is *prima facie* fraudulent. Clark *v.* Douglass, 62 Penn. 408: Sewall *v.* Russell, 2 Paige, 175.

If a plaintiff to an execution places it in the hands of the sheriff with any other view than that of having it *bonâ fide* executed, it is not valid against subsequent executions. Weir *v.* Hale, 3 W. & S. 285; Matthews *v.* Warne, 6 Halst. 295.

A mortgage made by an insolvent debtor which covers more property than is necessary to secure the mortgage debt, is fraudulent. Bailey *v.* Burton, 8 Wend. 339; Mitchell *v.* Beal, 8 Yerg. 134; Bennett *v.* Union Bank, 5 Humph. 612; see Downs *v.* Kissam, 10 How. 102.

A mortgage made in good faith to secure future advances is not fraudulent. United States *v.* Hoe, 3 Cranch, 73; Wilson *v.* Russell, 13 Md. 494; Lansing *v.* Woodworth, 1 Sandf. Ch. 43; Hendricks *v.* Robinson, 2 Johns. Ch. 283.

The length of time which a mortgage has to run may in connection with other facts be evidence of fraud. Spalding *v.* Fisher, 57 Me. 411; Crofts *v.* Arthur, 3 Dessau. 223; Mitchell *v.* Beal, 8 Yerg. 134.

A purchase in the name of a third person with intent to defraud the creditors of the purchaser, may be set aside. Guy *v.* Faris, 7 Yerg. 155; Kimmel *v.* Mesright, 2 Barr, 38; Guthrie *v.* Gardner, 9 Wend. 414; Farrow *v.* Teackle, 4 H. J. 271; Wiss *v.* Tripp, 1 Shep. 9; Peay *v.* Sublet, 1 Mo. 449; Coleman *v.* Cocke, 6 Rand. 618; Elliott *v.* Horn, 10 Ala. 355.

A purchase in the name of a third person can not be declared void in an action at law by a purchaser under a judgment. Howe *v.* Bishop, 3 Met. 26; Dolkray *v.* Mason, 48 Me. 178.

A reconveyance by the grantee under a fraudulent deed is fraudulent as to his creditors. Chapin *v.* Pease, 10 Ct. 69.

A mortgage made by the mortgagor after the execution of a fraudulent deed is valid and binds the property. Fox *v.* Clark, Walker's Ch. 535.

A fraudulent conveyance is void in *toto*, and not partly valid and partly void. When a deed is made void by statute, it is void throughout. Mackie *v.* Cairns, 1 Hopk. 373; s. c. 5 Cow. 547; Kirby *v.* Ingersoll, Harring's Ch. 172; Hyslop *v.* Clark, 14 Johns. 464; Weedon *v.* Hawes, 10 Ct. 50; Tickner *v.* Wishall, 9 Ala. 305.

A judgment recovered after the execution of the fraudulent conveyance is a lien upon the land, except as against *bonâ fide* purchasers. Manhattan Co. *v.* Evertson, 6 Paige, 457.

A fraudulent deed set aside at the instance of creditors, does not bar the surviving wife of dower as against creditors or purchasers under a mere decretal sale. Dugan *v.* Massey, 6 Bush, 81; Goodworth *v.* Paige, 5 Ohio St. R. 70; Summers *v.* Bebb, 13 Ill. 483; Stribling *v.* Ross, 16 Ill

declared by statutes 50 Edw. III, c. 6, and 3 Hen. VII, c. 4, all fraudulent gifts of goods and chattels in trust for the donor and to defraud creditors to be void; and by 13 Eliz. c. 5, all gifts, grants, and conveyances of goods, chattels, or land, made with an intent to hinder, delay, or defraud creditors were rendered void as against the person to whom such frauds would be prejudicial.[1] Estates, however, or interests in land or chattels conveyed or assured *bonâ fide* and upon good consideration, without notice of any fraud or collusion, are excepted from the operation of the statute.[2]

The statute 13 Eliz. c. 5, does not declare voluntary conveyances to be void, but only declares all fraudulent convey-

[1] Tarleton *v.* Liddell, 17 Q. B. 391.

[2] 13 Eliz. c. 5, §. 6. See Tarleton *v.* Liddell, 17 Q. B. 390, 4 Deg & S. 538.

122; Pixley *v.* Bennett, 11 Mass. 298; Robinson *v.* Bates, 3 Met. 40; Randolph *v.* Doss, 3 How. (Miss.) 205; *contra* Manhattan Co. *v.* Evertson, 6 Paige, 457.

A purchaser at a sale under an execution is clothed with all the rights of the judgment creditor. Sands *v.* Hildreth, 2 Johns. Ch. 35; s. c. 14 Johns. 493; Frakes *v.* Brown, 2 Blackf. 295; Gray *v.* Tappan, Wright, 117; Price *v.* Sykes, 1 Hawks, 87.

A fraudulent conveyance is valid against all parties, except creditors. Randall *v.* Phillips, 3 Mason, 378; Anderson *v.* Bradford, 5 J. J. Marsh. 69; Woodman *v.* Bodfish, 25 Me. 317; Morey *v.* Forsyth, Walker's Ch. 465; Delesdernier *v.* Moary, 2 App 150.

A vendee claiming under a fraudulent deed gains no title by a purchase under an execution. Foulk *v.* M'Farlans, 1 W. & S. 297.

A wife having a lawful claim for alimony, is a creditor. Feigley *v.* Feigley, 7 Md. 537; Boils *v.* Boils, 1 Cold. 284; Flake *v.* Brown, 2 Blackf. 295.

A person having a claim for a tort, is a creditor. Lillard *v.* M'Gee, 4 Bibb. 165; Jackson *v.* Myers, 18 Johns. 425; Farnsworth *v.* Bell, 5 Sneed, 531; Langford *v.* Fly, 7 Humph. 585; Walradt *v.* Brown, 1 Gilman, 397; *contra*, Fowler *v.* Frisbie, 3 Ct. 320.

The act applies to sureties as well as principal debtors. Van Wyck *v.* Seward, 18 Wend. 375; Howe *v.* Ward, 4 Greenl 195; Hutchinson *v.* Kelly, 1 Rob. 123; Carlisle *v.* Rich, 8 N. H. 44; Russell *v.* Stinson, 3 Hey. 1; Thompson *v.* Thompson, 1 App. 244

ances to be void.[1] Whether a conveyance be fraudulent or not is declared by the statute to depend upon its being made "upon good consideration and *bonâ fide*." It is not sufficient that it be upon good consideration or *bonâ fide*. It must be both. Although a deed be made upon good consideration within the meaning of the statute, it is void against creditors, unless it be *bonâ fide*.[2] * The expression "good consideration" in the statute means valuable consideration. Meritorious consideration, such as love, affection, &c., though good as between the parties themselves, is not in the eye of the law *bonâ fide*, if it is inconsistent with that good faith which is due to creditors.[3] † As between the parties themselves and all persons claiming under them in privity of estate, voluntary conveyances are binding,[4] but in so far as they have the effect of delaying, defrauding, or deceiving creditors, voluntary conveyances are not *bonâ fide*, and are void as against creditors to the extent to which it may be necessary to deal with the property to their satisfaction. To this extent, and to this extent only, they will be treated as if they had not been made. To every other purpose they are good.[5]

[1] Russell *v.* Hammond, 1 Atk. 13; Doe *v.* Routledge, Cowp. 708; Cadogan *v.* Kennett, *ib.* 432, 434; Holloway *v.* Millard, 1 Madd. 414; Gale *v.* Williamson, 8 M. & W. 405.

[2] Twyne's Case, 3 Co. Rep. 81; Worsley *v.* De Mattos, 1 Burr. 474, 475; Cadogan *v.* Kennett, Cowp. 434; Bott *v.* Smith, 21 Beav. 516; Harman *v.* Richards, 10 Ha. 81; Thompson *v.* Webster, 4 Drew. 628; 7 Jur. N. S. 531; Lloyd *v.* Attwood, 3 D. & J. 655; Fraser *v.* Thompson, 4 D. & J. 600 Corlett *v.* Radcliffe, 14 Moo. P. C. 121, 135.

[3] Copis *v.* Middleton, 2 Madd. 430; Taylor *v.* Jones, 2 Atk. 600; Strong *v.* Strong, 18 Beav. 408; Goldsmith *v.* Russell, 5 D. M. & G. 547.

[4] Petre *v.* Espinasse, 2 M. & K. 496; Bell *v.* Cureton, *ib.* 503; French *v.* French, 6 D. M. & G. 95.

[5] Curtis *v.* Price, 12 Ves. 103; Worsley *v.* De Mattos, 1 Burr. 474; Bott *v.*

* Whiting *v.* Johnson, 11 St. R. 328; Clements *v.* Moore, 6 Wall. 229; Ashmead *v.* Hean, 13 Penn. 584.

† Edgington *v.* Williams, Wright, 439; Goodell *v.* Taylor, Wright, 82; O'Brien *v.* Coulter, 2 Blackf. 421; Killough *v.* Steele, 1 Stew. & Port. 262.

The services of a minor son, unless emancipated, are not a good consideration. Dick *v.* Grissom, 1 Freem. 428; Brown *v.* McDonald, 1 Hill's Ch. 306.

A deed which appears to be voluntary may be shown by any evidence (consistent with its terms) to have been made for valuable consideration,[1] but the evidence must be clear and free from suspicion.[2]

It is not enough, in order to support a settlement against creditors, that it be made for valuable consideration. It must also be *bonâ fide*. If it be made with intent to delay, hinder, or defraud creditors, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration.[3] * Cases have frequently occurred, in which

Smith, 21 Beav. 516; Croker *v.* Martin, 1 Bligh's N. S. 573; French *v.* French, 6 D. M. & G. 95; Neale *v.* Day, 28 L. J. Ch. 45. See Wakefield *v.* Gibbon, 1 Giff. 401; Murphy *v.* Abraham, 15 Ir. Ch. 371; Shaw *v.* Jeffrey, 13 Moo. P. C. 432.

[1] Pott *v.* Todhunter, 2 Coll. 76; Gale *v.* Williamson, 8 M. & W. 405; Kelson *v.* Kelson, 10 Ha. 385; Townend *v.* Toker, L. R. 1 Ch. Ap. 446, *supra*, p. 192.

[2] Graham *v.* O'Keefe, 16 Ir. Ch. 1.

[3] Twyne's Case, 3 Co. Rep. 81; Holmes *v.* Penney, 3 K. & J. 99.

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* Cragg *v.* Martin, 12 Allen, 498; Brady *v.* Briscoe, 12 J. J. Marsh. 212; Bozman *v.* Draughan, 3 Stew. 343; Kempner *v.* Churchill, 8 Wall. 362; Ward *v.* Trotter, 3 Mon. 1; Ayres *v.* Moore, 2 Stew. 336; Trotter *v.* Watson, 6 Humph. 509; Peck *v.* Land, 2 Kelly, 1; Farmers' Bank *v.* Douglass, 11 Smed. & Mar. 469; Dacey *v.* Daniel, 1 Smith, 252; Wright *v.* Brandis, 1 Carter, 336; Carr *v.* Hill, 1 Stockt. 210; Bum *v.* Ahl, 29 Penn. 387; Root *v.* Reynolds, 32 Vt. 139.

A deed not at first fraudulent may become so by being concealed or not pursued, if creditors are thereby drawn to give credit to the grantor. Hildreth *v.* Sands, 2 Johns. Ch. 35; Perins *v.* Dunn, 3 Johns. Ch. 508.

A conveyance to a creditor of property sufficient to pay his full debt upon condition that he will give a portion to the grantor's wife, is fraudulent. Kissam *v.* Edmonston, 1 Ired. Eq. 180

A subsequent payment will not give validity to a conveyance that was originally fraudulent. Poague *v.* Boyce, 6 J. J. Marsh. 70; Lynde *v.* McGregor, 13 Allen, 213; Hartman *v.* Diller, 62 Penn. 37; Pettibone *v.* Stevens, 15 Ct. 19; Thomas *v.* Goodwin, 12 Mass. 140.

If an instrument is made with the intent to hinder and delay creditors, it is not purged, because the grantor may also have had some other purpose in view. Reed *v.* Noxon, 48 Ill. 323; Merry *v.* Bostwick, 13 Ill. 21.

A deed which misrepresents the transaction which it recites, and the consideration upon which it is founded, is liable to suspicion, but if upon investigation the real transaction appears to be fair though some-

persons have given a full and fair price for goods, and where the possession has been actually changed, yet being done for the purpose of delaying or defeating creditors the transaction has been held fraudulent, and has therefore been set aside as against them.[1] Though there be a judgment against the vendor, and the purchaser has notice of it, that fact will not, of itself, affect the validity of the sale of personal property. But if the purchaser, knowing of the judgment, purchases with the view and purpose to defeat the creditor's execution, it is iniquitous and fraudulent, notwithstanding he may have given a full price, for it is assisting the debtor to injure the creditor. The question of fraud depends on the motive.[2] *

[1] Holmes *v.* Penney, 3 K. & J. 99; Worsley *v.* De Mattos, 1 Burr. 474, 475; Cadogan *v.* Kennett, Cowp. 434; Harman *v.* Richards, 10 Ha. 81.

[2] 1 Burr. 474; Cowp. 434, *per* Lord Mansfield; 8 Taunt. 678, *per* Dallas, C. J.

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what variant from that which is described, it will be valid. Shirras *v.* Craig, 7 Cranch, 34; Storer *v.* Harrington, 7 Ala. 142; Frost *v.* Warren, 42 N. Y. 204; Hubbard *v.* Turner, 2 McLean, 519; Bumpass *v.* Dotson, 7 Humph. 310.

A deed absolute in form but intended as a mortgage, is valid if made in good faith. Chickering *v.* Hatch, 3 Sumner, 474; Butler *v.* Stoddard, 7 Paige, 163; Smith *v.* Onion, 19 Vt. 427; Halcombe *v.* Ray, 1 Ired. 340; *contra*, North *v.* Belden, 13 Ct. 376; Tift *v.* Walker, 10 N. H. 150; Hadstior *v.* Williams, 31 Ala. 149.

* Lowry *v.* Pinson, 2 Bailey, 324; Hickman *v.* Quinn, 6 Yerg. 36; Bullock *v.* Irving, 4 Munf. 450; Bird *v.* Aitken, 1 Rice's Ch. 73; Thornton *v.* Davenport, 1 Scam. 296; Williams *v.* Jones, 2 Ala. 314; Clemens *v.* Davis, 7 Barr, 263; Petters *v.* Smith, 4 Rich. Eq. 197.

It is not sufficient that a creditor knows of the double intent of the debtor to give a preference and to defeat other creditors, and that he concurs in the act by which that intent in both its aspects is effectuated. He must have concurred in the illegal intent before he can be involved in its consequences. Ford *v.* Williams, 3 B. Mon. 550; Worland *v.* Kimberlin, 6 B. Mon. 608; Brown *v.* Smith, 7 B. Mon. 361.

Notice of the fraudulent intent before the payment of the purchase money will make the conveyance fraudulent. Parkinson *v.* Hanna, 7 Blackf. 400; Johnson *v.* Brandis, 1 Smith, 263; White *v.* Graves, 7 J. J. Marsh. 523.

A conveyance can not be impeached by proof of a fraudulent intent

The consideration of marriage, although the most valuable of all considerations, if there be *bonâ fides*,[1] will not support a settlement by a man in insolvent or embarrassed circumstances, if there be evidence to show that the intended wife was implicated in any design to delay or defraud the creditors of the intended husband, or that the marriage was part of a scheme or contrivance between them to protect his property against the claims of his creditors.[2] *

A postnuptial settlement made in pursuance of a prior valid written agreement is valid against creditors,† but a parol antenuptial agreement does not prevent a postnuptial settlement from being voluntary.[3] Nor will the written recognition after marriage of a verbal promise, made before

[1] Campion *v.* Cotton, 17 Ves. 264; *Ex-parte* M'Burnie, 1 D. M. & G. 441; Dilkes *v.* Broadmead, 2 D. F. & J. 566.

[2] Colombine *v.* Penhall, 1 Sm. & G. 228; Fraser *v.* Thompson, 4 D. & J. 600. See *ex-parte* M'Burnie, 1 D. M. & G. 445.

[3] Spurgeon *v* Collier, 1 Eden, 61; Randall *v.* Morgan, 12 Ves. 67; Lassence *v.* Tierney, 1 Mac. & G. 551; *Ex-parte* M'Burnie, 1 D. M. & G. 445; Warden *v.* Jones, 2 D. & J. 76; Goldicutt *v.* Townsend, 28 Beav. 445.

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on the part of the grantor, unless it is known to the grantee. Green *v.* Tanner, 8 Met. 411; Sands *v.* Hildreth, 14 Johns. 493; Astor *v.* Wells, 4 Wheat. 466; Stover *v.* Herrington, 7 Ala. 142; Violett *v.* Violett, 2 Dana, 323; Partels *v.* Harris, 26 Ct. 480; Splaun *v.* Martin, 17 Ark. 146; Chouteau *v* Sherman, 11 Mo. 385; Bancroft *v.* Blizzard, 13 Ohio, 30.

Although the law permits a failing debtor to make a preference, it denies him the right while doing so to provide that unpreferred creditors shall never be paid. Drury *v.* Cross, 7 Wall. 299.

* A marriage settlement must be reasonable, and with a due regard to the rights of others. If it is disproportionate to the means of the grantor, it is fraudulent. Simpson *v.* Graves, Riley's Ch. 292; Croft *v.* Arthur, 3 Dessau. 223.

To make an antenuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the fraud. Magniac *v.* Thompson, 7 Pet. 348.

A conveyance by the grantee under a fraudulent deed to a creditor of the grantor for the purpose of recovering his debt, is valid. Brown *v.* Webb, 20 Ohio, 389.

† Magniac *v.* Thompson, 7 Pet. 348; Lockwood *v.* Nelson, 16 Ala. 294.

marriage, support a postnuptial settlement against creditors.[1] Postnuptial settlements are, as a general rule, voluntary deeds, and, therefore, void as against creditors;[2]* but in certain cases the concurrence of a stranger may deprive a postnuptial settlement of its voluntary character.[3] So also a postnuptial settlement made on the receipt of an additional portion is a settlement for valuable consideration.[4] The fact that a postnuptial settlement may be founded on a moral duty, will not deprive it of its voluntary character.[5] In certain cases, however, a settlement made upon a wife after marriage, is not to be treated as wholly voluntary, where it is done in performance of a duty which a court of equity would enforce.† Thus, if a man should contract a marriage by stealth with a woman having a considerable fortune in the hands of trustees, and he should afterwards make a suitable provision on her in respect of her fortune, the settlement would not be set aside in favor of the creditors of the husband, since a court of equity would not suffer him to take possession of her fortune, without making a suitable settlement on her.[6]

[1] Randall *v.* Morgan, 12 Ves. 67; Warden *v.* Jones, 2 D. & J. 76.

[2] Sug. V. & P. 715.

[3] Dart. V. & P. 576. See Holmes *v.* Penney, 3 K. & J. 90.

[4] Sug. V. & P. 718; Dart, V. & P. 576.

[5] Holloway *v.* Headington, 8 Sim. 324; Jefferys *v.* Jefferys, Cr. & Ph. 138, 141.

[6] Moore *v.* Rycault, Prec. Ch. 22, and other cases cited, 1 Fonb. Bk. 1, c. 4, § 12, and note (*b*), *ib.* c. 2, § 6; Jones *v.* Marsh, Ca. t. Talb. 64; Wheeler *v.* Caryl, Amb. 121; Jewson *v.* Moulson, 2 Atk. 417: Middlecombe *v.* Marlow, *ib.* 519; Ward *v.* Shallett, 2 Ves. 16; Ramsden *v.* Hylton, *ib.* 304; Arundell *v.* Phipps, 10 Ves. 139.

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* Izard *v.* Izard, 1 Bailey's Ch. 228; Saunders *v.* Ferrill, 1 Ired. 97; Deerbell *v.* Fisher, R. M. Charlton, 36; Blow *v.* Maynard, 2 Leigh, 29; Jones *v.* Henry, 3 Litt. 427; Simpson *v.* Graves, Riley's Ch. 232.

† Wickes *v.* Clark, 3 Edw. Ch. 58; Bank of U. S. *v.* Brown, Riley's Ch. 131; Smith *v.* Greer, 3 Humph. 118; Garrell *v.* Grant, 4 Met. 486; McCauley *v.* Rhodes, 7 B. Mon. 462.

An antenuptial settlement upon the intended wife and her children, born before marriage, is valid. Coutts *v.* Greenhorn, 2 Munf. 383; s. c. 4 Hen. & M. 485.

An antenuptial settlement containing trusts in favor of the husband, wife, and issue, and also ulterior trusts for collaterals is, so far as the ulterior trusts are concerned, voluntary;[1] but if the limitations in the settlements so interfere with those which would naturally be made in favor of the husband, wife, and issue, that they must be presumed to have been agreed upon by all parties, as part of the marriage contract, they are not voluntary and will be upheld.[2]

There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors. Some cases appear to lay down the rule that a deed is not invalid, unless the grantor or settler was at the time indebted to the extent of insolvency, but the rule as so laid down is clearly not correct.[3] According to *dicta*, in other cases, a voluntary settlement is not invalid, although the settler may have been considerably indebted at the time of the settlement, provided he was not indebted beyond his means of payment remaining after the settlement.[4] But in Spirett *v.* Willows,[5] Lord Westbury laid it down as the conclusion to be drawn from the cases, that if the debt of the creditor, by whom the voluntary settlement is impeached, existed at the date of the settlement, and it be the necessary consequence of the settlement that creditors are defrauded or delayed, it is immaterial whether the debtor was or was not solvent after making the settlement. "The fact," he said, "of a voluntary settler retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement or take it out of the statute. It still remains a voluntary alienation or deed of

[1] Smith *v.* Cherrill, L. R. 4 Eq. 390.
[2] Clarke *v.* Wright, 6 H. & N. 869; Dart, V. & P. 578, 581, see *infra*.
[3] 4 Drew, 632 *per* Kindersley, V.-C.
[4] See Townsend *v.* Westacott, 2 Beav. 340; Skarf *v.* Soulby, 1 Mac. & G. 364, 1 H. & Tw. 429; French *v.* French, 6 D. M. & G. 95; Seward *v* Jackson, 8 Cow. (Amer.), 406.
[5] 34 L. J. Ch. 365.

gift, whereby in the event the remedies of creditors are 'delayed, hindered, or defrauded.'"[1] The rule so laid down may operate harshly in cases where an ample fund is retained by a settler for the payment of his debts, and he afterwards, at some distance of time, loses or spends so much of his property as not to leave enough to pay such debts. But the rule appears on the whole to be sound, and agrees with the opinion of Kent, C., in Livingstone *v.* Reade.[2] "The conclusion," he said, "to be drawn from the cases is that if the party is indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement or repel the legal presumption of fraud. The presumption of law in this case does not depend upon the amount of debts or the extent of the property in settlement or the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt would be embarrassing, if not dangerous to the rights of creditors, and prove an inlet to fraud. The law has, therefore, wisely disabled the debtor from making any voluntary settlement of his estate to stand in the way of existing debts." It must, however, be observed that the reasoning of Kent, C., has not been followed in later American cases, and that the doctrine has not been pressed to the extent of holding a voluntary conveyance made on a meritorious consideration, as of blood and affection, void, because there was a small indebtedness at the time. The better doctrine has been held to be that there is no absolute presumption of fraud which entirely disregards the intent and purpose of the conveyance, if the grantor happened to be indebted at the time it was made, but that such a conveyance, under such circumstance, affords only

[1] See French *v.* French; 6 D. M. & G. 95; Thompson *v.* Webster, 7 Jur. N. S. 531; Corlett *v.* Radcliffe, 14 Moo. P. C. 121, 135; Smith *v.* Cherrill, L. R. 4 Eq. 395.

[2] 3 Johns. Ch. (Amer.), 500.

prima facie, or presumptive evidence of fraud, which may be rebutted or controlled, the question being in each case a question of fact for the jury.[1]

In his Commentaries[2] Kent, C., admits the tendency of the decisions both in America and England to be to leave the conclusion of fraud as a matter of fact for a jury; but he does not approve of the rule, and adheres to the doctrine of Reade *v.* Livingstone, and thinks that the presumption of fraudulent intent in cases of the sort may and ought to be an inference of law.[3] *

The provisions of the stat. 13 Eliz. c. 5, are not confined to existing creditors, but extend to subsequent creditors, whose

[1] Seward *v.* Jackson, 8 Cow. (Amer.), 406; Bank of United States *v.* Housemau, 6 Paige (Amer.), 526; Wickes *v.* Clarke, 8 Paige (Amer.), 165; Hinde's Lessees *v.* Longworth, 11 Wheat. (Amer.), 199; Thacher *v.* Phinney, 7 Allen (Amer.), 150; Lerow *v.* Wilmarth, 9 *ib.* 386; Story's Eq. Jur. 362. See also Thompson *v.* Webster, 4 Drew. 632, *per* Kindersley, V.-C.; Graham *v.* O'Keefe, 16 Ir. Ch. 1.

[2] Vol. 2, p. 442.

[3] See Van Wyck *v.* Seward, 18 Wend. (Amer.) 392, 405.

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* A voluntary conveyance by a person not indebted is good against future creditors. Sexton *v.* Wheaton, 8 Wheat. 229; Benton *v.* Jones, 8 Ct. 186; Mattingly *v.* Nye, 8 Wall. 370; Davis *v.* Payne, 4 Rand. 332; Baker *v.* Welch, 4 Mo. 484.

A voluntary deed by a person indebted at the time of its execution is not absolutely void as against creditors. The mere fact of being in debt does not make the deed fraudulent if it can be shown that the gift was a reasonable provision according to the state and condition of the grantor, and left enough for the payment of debts. The want of consideration is only a presumptive badge of fraud, and may be met and rebutted by evidence on the other side. Hinde *v.* Longworth, 11 Wheat. 199; Parish *v.* Murphree, 13 How. 92; Salmon *v.* Bennett, 1 Ct. 525; Hopkirk *v.* Randolph, 2 Brock. 132; Leyne *v.* Bank of Ky., 5 J. J. Marsh. 545; Young *v.* White, 25 Miss. 146; Carpenter *v.* Roe, 10 N. Y. 227; Wilson *v.* Houser, 12 Penn. 109; Lerow *v.* Wilmarth, 9 Allen, 382; Dodd *v.* McCraw, 3 Eng. 83; Arnett *v.* Wanett, 6 Ired. 41; Hall *v.* Edrington, 8 B. Mon. 47; Stewart *v.* Rogers, 25 Iowa, 395; Van Wyck *v.* Seward, 18 Wend. 375; Bank of Alexandria *v.* Patton, 1 Rob. 499; Dillard *v.* Dillard, 3 Humph. 118; Bird *v.* Bolduc, 1 Mo. 701.

The relinquishment of a marital right to a legacy is valid against creditors. Gallego *v.* Gallego, 2 Brock. 285.

debts had not been contracted at the date of the settlement;[1] but the principle will not operate in favor of subsequent creditors, unless it can be shown either that the settler made the settlement with the express intent to "delay, hinder, or defraud" persons who might become creditors,[2] * or that after the settlement the settler had not sufficient means or reasonable expectation of being able to pay his then existing debts, in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors,[3] † or at least that there are debts unsatisfied which were due at the date of the settlement.[4] If at the time of filing the bill no debt due at the execution of the settlement remains unpaid, and there is no evidence to show that the settlement had for its object the delaying, hindering, or defrauding of subsequent creditors, the settlement prevails against them,[5] ‡ but if any debt due at

[1] Tarback *v.* Marbury, 2 Vern. 509.

[2] Stileman *v.* Ashdown, 2 Atk. 481; Stephens *v.* Ollive, 2 Bro. C. C. 91; Holloway *v.* Millard, 1 Madd. 414; Holmes *v.* Penney, 3 K. & J. 99; Barling *v.* Bishop, 29 Beav. 417; Murphy *v.* Abraham, 15 Ir. Ch. 371.

[3] Spirett *v.* Willows, 34 L. J. Ch. 367, *per* Lord Westbury; Thompson *v.* Webster, 7 Jur. N. S. 531. Comp. Holmes *v.* Penney, 3 K. & J. 90.

[4] Jenkyn *v.* Vaughan, 3 Drew. 419; Barton *v.* Vanheythuysen, 11 Ha. 132. Comp. Holmes *v.* Penney, 3 K. & J. 90.

[5] Jenkyn *v.* Vaughan, 3 Drew. 419. See Russell *v.* Hammond, 1 Atk. 13;

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* Case *v.* Phelps, 39 N. Y. 164; Hall *v.* Sands, 52 Me. 355; Bedford *v.* Crane, 1 C. E. Green, 265; Henderson *v.* Dodd, 1 Bailey's Ch. 138; Blake *v.* Jones, 1 Bailey's Ch. 141; Russell *v.* Stenson, 3 Hey. 1; Cosby *v.* Ross, 3 J. J Marsh. 290; Bogard *v.* Gardley, 4 Smed. & Mar. 302; Wright *v.* Henderson, 7 How. (Miss.) 539; Henry *v.* Fullerton, 13 Smed. & Mar. 631; Mullen *v.* Wilson, 44 Penn. 413; Savage *v.* Murphy, 8 Bosw. 75; Carlisle *v.* Rich, 8 N. H. 44; Winchester *v.* Charter, 12 Allen, 606; 97 Mass. 140; 102 Mass. 272.

† Parkman *v.* Welch, 19 Pick. 231; Bank of Alexandria *v.* Atwater, 1 Rob. 499; Hutchinson *v.* Kelly, 1 Rob. 123; Hey *v.* Niswanger, 1 McCord's Ch. 518; s. c. 1 Harp. Ch. 295; Hamilton *v.* Thomas, 5 Hey. 127; Hanzen *v.* Power, 8 Dana, 91; Mason *v.* Rogers, 1 Root, 324; Miller *v.* Thompson, 3 Port. 198; Clark *v.* French, 10 Shep. 221; McConipe *v.* Sawyer, 12 N. H. 396; Thompson *v.* Dougherty, 12 S. & R. 448; Somerville *v.* Horton, 4 Yerg. 541; Darwin *v.* Handley, 3 Yerg. 302; Simpson *v.* Mitchell, 8 Yerg. 417; King *v.* Wilcox, 11 Paige, 589; Hester *v.* Wilkinson, 6 Humph. 215.

‡ Tate *v.* Tate, 1 Dev. & Bat. Eq. 22; Ingram *v.* Philips, 3 Strobh. 865.

the date of the settlement remains unsatisfied at the time of filing the bill,[1] or if there be evidence to show that the settlement was made in contemplation of future debts, or in furtherance of a meditated design of future fraud, although the settler may not have been indebted at the time,[2] the deed will be set aside.[3] If a settlement is set aside as fraudulent against creditors whose debts accrued before its execution, subsequent creditors are entitled to participate:[4] but if antecedent creditors can not make out a case for setting it aside, subsequent creditors can not impeach the settlement as fraudulent by reason of the prior indebtment.[5]

In Holmes *v.* Penney[6] the conveyance by a man of his property to trustees for valuable consideration upon trust to apply it at their discretion in the maintenance of himself, his wife and children, or any of them, in such a manner as they should think fit, was held valid against subsequent creditors,

Holmes *v.* Penney, 3 K. & J. 96; Barling *v.* Bishop, 29 Beav. 417; Thompson *v.* Webster, 7 Jur. N. S. 531.

[1] Jenkyn *v.* Vaughan, 3 Drew. 419. Comp. Holmes *v.* Penney, 3 K. & J. 90. See Graham *v.* O'Keefe, 16 Ir. Ch. 1.

[2] Stileman *v.* Ashdown, 2 Atk. 481; Richardson *v.* Smallwood, Jac. 552; Holloway *v.* Millard, 1 Madd. 414; Barling *v.* Bishop, 29 Beav. 417; Murphy *v.* Abraham, 15 Ir. Ch. 371; Graham *v.* O'Keefe, 16 Ir. Ch. 1; Savage *v.* Murphy, 7 Tiff. (Amer.) 508.

[3] See Whittington *v.* Jennings, 6 Sim. 496.

[4] Richardson *v.* Smallwood, Jac. 552; Ede *v.* Knowles, 2 Y. & C. C. C. 172; Barton *v.* Vanheythuysen, 11 Ha. 132.

[5] See Holloway *v.* Millard, 1 Madd. 419; Walker *v.* Burrows, 1 Atk. 94; Ede *v.* Knowles, 2 Y. & C. C. C. 172, 178. Comp. Story's Eq. Jur. 363.

[6] 3 K. & J. 99.

Accounts which have been merged in judgments may be offered in evidence to show an indebtedness prior to the making of the deed. Hinds *v.* Longworth, 11 Wheat. 199; Harlan *v.* Barnes, 5 Dana, 219.

A contingent debt likely to become absolute, and which afterwards does become absolute, is sufficient. McLaughlin *v.* Bank of Potomac, 7 How. 220.

A debt by a note which is afterwards renewed, continues to be the same debt. McLaughlin *v.* Bank of Potomac, 7 How. 220; Eigleberger *v.* Kibler, 1 Hill's Ch. 113.

Subsequent debts contracted in exoneration of preceding ones are nothing more than a continuance of antecedent indebtedness. Brown *v.* McDonald, 1 Hill's Ch. 297; Savage *v.* Murphy, 34 N. Y. 508.

and also against a person who was a creditor at the time of making the conveyance, and whose debt was concealed by the settler from the purchaser. It was also laid down[1] by Wood, L. J., that a voluntary settlement to the same effect would be upheld against subsequent creditors.

In order to make a voluntary settlement or conveyance void as against creditors, whether existing or subsequent, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of debts.[2] * Under the old law a voluntary settlement of stock or of choses in action, or of copyholds, or of any other property not liable to execution was not within the statute of Elizabeth:[3] but copyholds, bonds, money, stock, &c., &c., being under 1 Vict. c. 100 seizable in execution, are now within the statute.[4]

A strong presumption of fraud against creditors arises, where after a bill of sale of chattel property, purporting on its face to take effect immediately, the vendor or settler is after its execution permitted to remain in possession of the property.[5] † It is otherwise, however, if his continuance in

[1] 3 K. & J. 100.

[2] See Dundas *v.* Dutens, 1 Ves. Jr. 196; Caillaud *v.* Estwick, Anst. 381; Nantes *v.* Corrock, 9 Ves. 188, 189; Rider *v.* Kidder, 10 Ves. 368; Guy *v.* Pearkes, 18 Ves. 196.

[3] *Ib*; Horn *v.* Horn, Amb. 79; Cochrane *v.* Chambers, *ib.* n. Norcutt; *v.* Dodd, Cr. & Ph. 100.

[4] Norcutt *v.* Dodd, Cr. & Ph. 100; Barrack *v.* M'Culloch, 3 K. & J. 110; French *v.* French, 6 D. M. & G. 95; Warden *v.* Jones, 2 D. & J. 76; Stokoe *v.* Cowen, 29 Beav. 637.

[5] Twyne's Case, 3 Co. Rep. 81; Edwards *v.* Harben, 2 T. R. 587.

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* Bean *v.* Smith, 2 Mason, 252; Poague *v.* Boyce, 6 J. J. Marsh. 70; Bayard *v.* Hoffman, 5 Johns. Ch. 450; Planters' Bank *v.* Henderson, 4 Humph 75; Winebrenner *v.* Wersiger, 3 Mon. 32; Legro *v.* Lord, 1 Fairf. 161; Foster *v.* M'Gregor, 11 Vt 595; Dearman *v.* Dearman, 4 Ala. 521; How *v.* Wayman, 12 Mo. 169; Lishey *v.* Clayton, 6 Bush, 515.

If a debtor without any secret trust or intentional fraud invests his money in improvements upon the real estate of another, his creditors can not treat such third party, or the land as liable to them. Ewing *v.* Cantrels, 1 Meigs, 364.

† Concurrent possession by grantor and grantee is colorable. The

possession is consistent with the nature of the transaction, as where a bill of sale is not absolute on its face or in its form, but only conditional, so that possession is not to be given until the condition has been performed.[1]* In Edwards *v.* Harben[2]† the court went so far as to say that possession of goods sold under an absolute bill of sale is conclusive evidence of fraud; but the tendency of later decisions has been to qualify that doctrine, and the weight of authority is in favor of the modified doctrine that possession by the vendor or settler affords only a badge or *prima facie* presumption of fraud, which may be rebutted by explanation, showing the transaction to be fair and honest, and giving a reasonable ground for the retention of possession. The question as to fraud in

[1] Edwards *v.* Harben, 2 T. R. 587; Cadogan *v.* Kennett, Cowp. 434; Martindale *v.* Booth, 3 B. & Ad. 498, 505; Minshall *v.* Lloyd, 2 M. & W. 450; but see 17 & 18 Vict. c. 36, Registration of Bills of Sales Act, 1 Smith's L. C. 14: Addison on Contracts, 147–150.

[2] 2 T. R. 587.

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possession must be exclusive. Boyd *v.* Dunlap, 1 Johns. Ch. 478; Baxter *v.* Gaines, 4 Hen & M. 151; Hall *v.* Parsons, 17 Vt. 271; Mills *v.* Warner, 19 Vt. 609; Stadtler *v.* Wood, 24 Tex. 622.

Joint possession by husband and wife is not fraudulent. Danforth *v.* Wood, 11 Paige, 9.

Assumption of possession after the death of the grantor is not sufficient. Shields *v.* Anderson, 3 Leigh, 729.

A mortgagee who takes a release of an equity of redemption, thereby extinguishes his mortgage, and, if the release is fraudulent, his right is gone. Glascock *v.* Batton, 6 Rand. 78; Clayborn *v.* Hill, 1 Wash. (Va.) 177; *contra*, Irish *v.* Morse, 10 Vt. 81; Toule *v.* Hoit, 14 N. H. 61.

* Letcher *v.* Norton, 4 Scam. 575; U. S. *v.* Hoe, 3 Cranch, 73; Bank of Georgia *v.* Higginbottom, 9 Pet. 148; Gist *v.* Pressley, 2 Hill's Ch. 318; Briggs *v.* Parkman, 2 Met. 258; Planters' & Merchants' Bank *v.* Willis, 5 Ala. 770; Leane *v.* Borland, 2 Shep. 77; Ash *v.* Savage, 5 N. H. 545; Maney *v.* Killough, 7 Yerg. 440.

† It has been held in the following cases that the retention of possession by the vendor was fraudulent *per se*. Hamilton *v.* Russell, 1 Cranch, 310; Phettiplace *v.* Sayles, 4 Mason, 312; Fuller *v.* Sears, 5 Vt. 527; Farnsworth *v.* Shepard, 6 Vt. 521; Mills *v.* Camp, 14 Ct. 219; Kirtland *v.* Snow, 20 Ct. 23; Doack *v.* Brubacker, 1 Nev. 218; Babb *v.* Clemsen, 10 S. & R. 419; Young *v.* M'Clure, 2 W. & S. 147; Jarvis *v.* Davis, 14 B. Mon.

such cases is not an inference of law, but one of fact for the jury.[1] *

[1] Lady Arundell *v.* Phipps, 10 Ves. 145; Martindale *v.* Booth, 3 B. & Ad. 498, 505; Latimer *v.* Batson, 4 B. & C. 652; Lindon *v.* Sharp, 6 M. & G. 895, 898, *per* Tindal, C. J.; Macdona *v.* Swiney, 8 Ir. C. L. 73; Cooke *v.* Walker, 3 W. R. 357; 1 Smith's L. C. p. 13.

52; Hundley *v* Webb, 3 J. J. Marsh. 643; Bremmel *v.* Stockton, 3 Dana, 134; Chenery *v.* Palmer, 6 Cal. 119; Gibson *v.* Love, 4 Fla. 217; Sanders *v.* Pepoon, 4 Fla. 465; Bowman *v.* Herring, 4 Harring. 458; Jorda *v.* Lewis, 1 La. An. 59; Coburn *v.* Pickering, 3 N. H. 415; Clafflin *v.* Rosenberg, 42 Mo. 439; Ketchum *v.* Watson, 24 Ill. 591.

* It has been held in the following cases that the retention of possession by the vendor is only presumptive evidence of fraud. Warner *v.* Norton, 20 How. 448; Hombeck *v.* Vanmetre, 9 Ohio, 153; Collins *v.* Myers, 16 Ohio, 547; Reed *v.* Jewett, 5 Greenl. 96; Ulmer *v.* Hills, 8 Greenl. 326; Brooks *v.* Powers, 15 Mass. 244; Bartlett *v.* Williams, 1 Pick. 288; Hanford *v.* Artcher, 4 Hill, 271; Thompson *v.* Blanchard, 4 N. Y. 303; Terry *v.* Belcher, 1 Bailey, 568; Davis *v.* Turner, 4 Gratt. 422; Forkner *v.* Stuart, 6 Gratt. 197; Callen *v.* Thompson, 3 Yerg. 475; Manly *v.* Killough, 7 Yerg. 440; Vick *v.* Keys, 2 Hayw. 126; Foley *v.* Knight, 4 Blackf. 420; Watson *v.* Williams, 4 Blackf. 26; Miller *v.* Pancoast, 4 N. Y. 303; Beers v. Dawson, 8 Geo. 556; Kuykendall *v.* McDonald, 15 Mo. 416; Bryant *v.* Kelton, 1 Tex. 415; Morgan *v.* Republic, 2 Tex. 273; Livingston *v.* Littell, 15 Wis. 221; Bullis *v.* Borden, 21 Wis. 136; Hobbs *v.* Bibb, 2 Stew. 54–336; Mayer *v.* Clark, 40 Ala. 259; Rankin *v.* Holloway, 3 Smed. & Mar. 614; Comstock *v.* Rayford, 12 Smed. & Mar. 369; Frield *v.* Simco, 2 Eng. 269.

After a sale under an execution when a stranger is a purchaser, the property may be left in the possession of the vendor. Floyd *v.* Goodwin, 8 Yerg. 484; Andrews *v.* Brooks, 11 Ala. 953; Abney *v.* Kingsland, 10 Ala. 355; Simerson *v.* Bank of Decatur, 12 Ala. 205; Garland *v.* Chambers, 11 Smed. & Mar. 337; Coleman *v.* Bank of Hamburg, 2 Strobh. Eq. 285.

Possession for a long time after a sale under an execution is fraudulent. Taylor *v.* Mills, 2 Edw. Ch. 318; Stover *v.* Farmers' & Merchants' Bank, 8 Smed. & Mar. 305.

Want of possession is not presumptive of fraud if, from the circumstances of the property, possession can not be given. A familiar example of this doctrine is in the case of a sale of a ship or goods at sea where possession is dispensed with on the plain ground of its impossibility; and it is sufficient if the vendee takes possession of the property within a reasonable time after its arrival in port. Conrad *v.* Atlantic Fire Ins. Co., 1 Pet. 386; Portland Bank *v.* Stacey, 4 Mass. 661; Putnam *v.* Dutch, 8 Mass. 287; Joy *v.* Sears, 9 Pick. 4.

Transactions which have for their object the defeating or defrauding of creditors must be carefully distinguished from cases where a sale, or assignment, or other conveyance merely amounts to giving a preference to one creditor, or to one set of creditors, over another, or where the assignment or conveyance is made for the benefit of all creditors. The law tolerates assignments giving one creditor a preference over another. * The fact that an assignment may have been expressly made with the intent to defeat the claim of a particular creditor is of no consequence either at common law or under the statute of Elizabeth, if the consideration be adequate.[1] Under the bankrupt law, however, the transfer by a man of the whole, or the bulk, or even a part of his property to a creditor in consideration of an antecedent debt is fraudulent, if made voluntarily and in contemplation of bankruptcy.[2]

[1] Holbird *v.* Anderson, 5 T. R. 235; Estwick *v.* Caillaud, 5 T. R. 420; Grogan *v.* Cooke, 2 Ba. & Be. 235; Pickstock *v.* Lyster, 3 M. & S. 371; Wood *v.* Dixie, 7 Q. B. 892; Hale *v.* Saloon Omnibus Co., 4 Drew. 592; Wolverhampton and Staffordshire Banking Co. *v.* Marston, 7 H. & N. 148. But see Bott *v.* Smith, 21 Beav. 511.

[2] Smith *v.* Cannan, 2 E. & B. 35, Bittleston *v.* Cooke, 6 E. & B. 298; Young *v.* Fletcher, 3 H. & C. 732, *infra*.

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* Tompkins *v.* Wheeler, 16 Pet. 106; Marbury *v.* Brooks, 7 Wheat. 556; s. c. 11 Wheat. 78; Murray *v.* Riggs, 15 Johns. 571; Green *v.* Tanner, 8 Met. 411; Skipwith *v.* Cunningham, 8 Leigh, 271; U. S. Bank *v.* Hath, 4 B. Mon. 423.

An assignment for the benefit of creditors exacting releases is valid. Brashear *v.* West, 7 Pet. 608; Lippincott *v.* Barker, 2 Binney, 174; Pierpont *v.* Graham, 4 Wash. (Penn.) 232; Halsey *v.* Whitney, 4 Mason, 230; Nicolen *v.* Douglass, 2 Hill's Ch. 443; Ashunt *v.* Martin, 9 Port. 566; Vose *v.* Holcomb, 31 Me. 407; Heydock *v.* Stanhope, 1 Curt. 471; Pierce *v.* Jackson, 1 R. I. 35; Dockray *v.* Dockray, 2 R. I. 547; Rankin *v.* Lodor, 21 Ala. 380; McCall *v.* Hinkley. 4 Gill, 128; Kettlewell *v.* Stewart, 8 Gill, 472; *contra*, Wakeman *v.* Grover, 4 Paige, 23; s. c. 11 Wend. 187, Amos *v.* Blunt, 5 Paige, 113; Ingraham *v.* Wheeler, 6 Ct 277; Atkinson *v.* Jordan, 5 Ohio, 293; Hyslop *v.* Clark, 14 Johns. 458; Austin *v.* Clark, 20 Johns. 442; Haven *v.* Richardson, 5 N. H. 113; The Watchman, Ware, 232; Conkling *v* Carson, 11 Ill. 503; Nesbit *v.* Digby, 13 Ill. 387; Miller *v.* Conklin, 17 Geo. 430.

An assignment by a man of his property for the benefit of his creditors is valid, and will be supported, provided the deed be *bonâ fide*, for the benefit of all the creditors, and there be an unconditional surrender by the debtor of all his property and effects.[1] But a deed which the debtor has a power to revoke, and attempts to use as a shield against his creditors, is fraudulent and void against creditors who are affected by the deed, notwithstanding the deed upon the face of it purports to be for the benefit of all the creditors.[2] So also is an instrument void as against creditors, if there is any provision contained in it which shows that the debtor, at the time of its execution, intended to prevent an immediate application of his property in favor of his creditors.[3] *

[1] Smith *v.* Hurst, 10 Ha. 30; Riches *v.* Evans, 9 C. & P. 641.
[2] Smith *v.* Hurst, 10 Ha. 30.
[3] Brigham *v.* Tillinghast, 3 Kern. (Amer.), 215.

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* The fact that the mortgagor is allowed to sell the mortgaged goods at retail after the execution of the mortgage, is merely a badge of fraud. Frost *v.* Warren, 42 N. Y. 204; Summers *v.* Roos, 42 Miss. 749.

A mortgage which contains a stipulation reserving to the mortgagor the power to sell the mortgaged property for his own benefit, is fraudulent. Edzell *v.* Hart, 9 N. Y. 21; Lang *v.* Lee, 3 Rand. 410; Collins *v.* McElroy, 16 Ohio, 547; Sheppard *v.* Turpin, 3 Gratt. 373; Addington *v.* Etheridge, 12 Gratt. 436; Brooks *v.* Wimer, 20 Mo. 503; Walter *v.* Wimer, 24 Mo. 63; Freeman *v.* Rauson, 5 Ohio St. R. 1; Harman *v.* Abbey, 7 Ohio St. R. 218; Chophard *v.* Bayard, 4 Minn. 533; Place *v.* Langworth, 13 Wis. 629; Armstrong *v.* Tuttle, 34 Mo. 432; Barnet *v.* Fergus, 51 Ill. 352.

When there is an agreement out of the mortgage that the mortgagor shall continue in possession, and buy and sell as usual, the mortgage is fraudulent. Gardner *v.* McEwen, 19 N. Y. 123; Russell *v.* Wines, 37 N. Y. 591; Ward *v.* Lowry, 17 Wend. 432; Delaware *v.* Ensign, 21 Barb. 85.

An agreement that the mortgagor shall continue in possession and sell the mortgaged property, and apply the proceeds to the satisfaction of the debt which the mortgage is given to secure, is not fraudulent. Conkling *v.* Shelley, 28 N. Y. 360; Ford *v.* Williams, 24 N. Y. 359; Miller *v.* Lockwood, 32 N. Y. 293; Saunders *v.* Turbeville, 2 Humph. 272; Abbott *v.* Goodwin, 20 Me 408; *Contra* Ticknor *v.* Wisnall, 9 Ala. 305.

The same policy of affording protection to the rights of creditors pervades the provisions of the statute 3 & 4 Will. & M. c. 14, respecting fraudulent devises in fraud of creditors;[1] but the statute does not reach conveyances, whether voluntary or not, which the debtor may make in his lifetime.[2] A debtor may alienate the land notwithstanding the existence of debts, or he may by will make it equitable assets, or he may devise it for the payment of a particular debt on simple contract, and so withdraw it from specialty creditors altogether. The creditors may, by taking proceedings, obtain payment out of the descended or devised real estates in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, whether upon a common purchase or on a settlement, even with notice that there are debts unpaid, the land is not liable, although the heir remains personally liable to the extent of the value of the land alienated.[3] The alienee, however, may be restrained at the suit of creditors from parting with the money.[4]

Another case of fraud upon creditors is where upon a composition by a debtor with his creditors, particular creditors, by means of secret bargains, secure to themselves undue advantages over the rest of the creditors. The principle of all composition deeds being that the debtor shall make a true representation of his assets, and that the creditors shall stand upon an equal footing and observe good faith towards each other, any secret arrangements between the debtor and a particular creditor, whereby he is placed in a more favored position than the rest of the creditors, is a fraud upon the

[1] See Jeremy on Eq. Jur. bk. 3, pt. 2, c. 3, § 4 pp. 415, 416. See also Coope *v.* Cresswell, L. R. 2 Ch. App. 112.

[2] 1 Fonb. Eq. b. 1, c. 4. § 14 n.

[3] Spackman *v.* Timbrell, 8 Sim. 253; Richardson *v.* Horton, 7 Beav. 112, 123; Dilkes *v.* Broadmead, 2 D. F. & J. 566. But see Pimm *v.* Insall, 1 Mac. & G. 449.

[4] Green *v.* Lowes, 3 Bro. C. C. 217.

others.[1] * In modern times, the same rule has been acted on at law.[2]

For the like reasons, any agreement made by an insolvent debtor with his assignee, by which the estate of the insolvent is to be held in trust by the assignee to secure certain benefits for himself and his family, such as to pay certain annuities to himself and his wife out of the rents or proceeds of the property assigned, and to apply the surplus to the extinction of debt due to the assignee, is void as being a contrivance in fraud of creditors.[3]

A creditor, however, holding a security for his own debt, may stipulate to have the benefit of it in addition to the amount of the composition offered by a debtor to his creditors, but he must hold himself entirely aloof from the other creditors, or distinctly communicate with them on the subject, if he at all acts in common with them.[4]

FRAUD UPON MARRIAGE ARTICLES.

Another class of frauds upon third parties, which will be relieved against in equity, is where persons after doing acts

[1] Jackman *v.* Mitchell, 13 Ves. 581; Sadler *v.* Jackson, 15 Ves. 52; Coleman *v.* Waller, 3 Y. & J. 215; Cullingworth *v.* Lloyd, 2 Beav. 385, and cases cited 395 n.; Pendlebury *v.* Walker, 4 Y. & C. 434; *Ex-parte* Oliver, 4 Deg. & Sm. 362; Mare *v.* Sandford, 1 Giff. 288; Mare *v.* Warner, 3 Giff. 100; Wood *v.* Barker, 1 L. R. Eq. 139. Comp. Lee *v.* Lockhart, 3 M. & C. 315.

[2] Cockshott *v.* Bennett, 2 T. R. 763; Knight *v.* Hunt, 5 Bing. 432; Lewis *v.* Jones, 4 B. & C. 506; Howden *v.* Haigh, 11 A. & E. 1033.

[3] McNeill *v.* Cahill, 2 Bligh, 228.

[4] Cullingworth *v.* Lloyd, 2 Beav. 385.

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* 1 Smith *v.* Stone, 4 G. & J. 310; Daughty *v.* Savage, 28 Ct. 146; Case *v.* Garrish, 15 Pick. 49; Ramsdell *v.* Edgarton, 8 Met. 227; Lothrop *v.* King, 8 Cush. 382; Breck *v.* Cole, 4 Sandf. 79; Carroll *v.* Shields, 4 E. D. Smith 466; Higgins *v.* Mayer, 10 How. Pr. 363; Lawrence *v.* Clark, 36 N. Y. 128; Pinneo *v.* Higgins, 12 Abb. Pr. 334; Beach *v.* Ollendorf, 1 Hilt. 41; Smith *v.* Owens, 21 Cal. 11; Bartleman *v.* Douglass, 1 Cranch's C. C. 450.

The rule has no application to a case where each creditor acts not only for himself but in opposition to every other creditor, all equally relying upon their vigilance to obtain priority. Clark *v.* White, 12 Pet. 178.

A concealment of a portion of his assets by the debtor will make

required to be done on a treaty of marriage, render those acts unavailing by entering into other secret agreements, or derogate from those acts or otherwise commit a fraud upon the relatives or friends of one of the contracting parties;[1] as where a parent declines to consent to a marriage on account of the intended husband being in debt, and the brother of the latter gives a bond for the debt to procure such consent, and the intended husband then gives a counter-bond to his brother to indemnify him against the first bond.[2] So, also, where a creditor of the intended husband concealed his own debt and misrepresented to the lady's father the amount of the debts of the intended husband, the transaction was treated as a fraud upon the marriage, and the creditor was restrained from enforcing his debt at law against the husband after the marriage.[3] So, also, where a brother on the marriage of his sister let her have a sum of money privately that her fortune might appear to be as much as was insisted on by the other side, and the sister gave a bond to the brother to repay it, the bond was set aside.[4] So, also, where the money due by an intended husband upon a mortgage was represented by the mortgagee to the relations of the wife to be much less than was really due, he was not allowed to recover more than he had represented the debt to amount to.[5]

Another case of fraud upon marriage articles is where a father, who had, on the marriage of his daughter, covenanted that he would upon his death leave her certain tenements, and would also by his will give and leave her a full and equal

[1] Peyton *v.* Bladwell, 1 Vern. 240.
[2] Redman *v.* Redman, 1 Vern. 348; Turton *v.* Benson, 1 P. Wms. 496; Scott *v.* Scott, 1 Cox, 366; Palmer *v.* Neave, 11 Ves. 166.
[3] Neville *v.* Wilkinson, 1 Bro. C. C. 543. See D'Albiac *v.* D'Albiac, 16 Ves. 124; Morris *v.* Clarkson, 1 J. & W. 107.
[4] Gale *v.* Lindo, 1 Vern. 475; Lamlee *v.* Hanman, 2 Vern. 499.
[5] Barrett *v.* Wells, Prec. Ch. 131.

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the deed void. Phettiplace *v.* Sayles, 4 Mason, 312; Richards *v.* Hunt, 6 Vt. 251; Jackson *v.* Hodges, 24 Md. 469; Seving *v.* Gale, 28 Ind. 486.

share with her brothers and sisters of all his personal estates, transfers afterwards during his life a very large portion of his personal property to his son, retaining the dividends for his own life.[1] Covenants of this sort do not prohibit a parent from making any disposition of his property during his life-time among his children more favorable to one than another; but they do prohibit a man from doing any acts which are designed to defeat or defraud the covenant. A parent may, if he pleases, notwithstanding the covenant, make an absolute gift to a child; but the gift must be an absolute and unqualified one, and must not be a mere reversionary gift, which saves the income to the parent during his own life.[2]

FRAUD UPON THE MARITAL RIGHTS.

Another class of transactions which will be relieved against as being in fraud of the marriage contract are conveyances made by an unmarried woman of her property, during the treaty of marriage without the knowledge of her intended husband, in contravention of his marital rights, or in disappointment of his just expectations.[3]* Several circumstances appear

[1] Jones *v.* Martin, 3 Anst. 882, 5 Ves. 265 n.; 8 Bro. P. C. 242. See Randall *v.* Willis, 5 Ves. 261; M'Neill *v.* Cahill, 2 Bligh, 228. Comp. Stocken *v.* Stocken, 4 M. & C. 95; Bell *v.* Clarke, 25 Beav. 436.

[2] Jones *v.* Martin, 3 Anst. 882, 5 Ves. 265 n.

[3] Lance *v* Norman, 2 Ch. Rep. 41; Lady Strathmore *v.* Bowes, 2 Bro. C. C. 345, 2 Cox, 33, 1 Ves. Jr. 22; Goddard *v.* Snow, 1 Russ. 485; England *v.* Downs, 2 Beav. 522; Taylor *v.* Pugh, 1 Ha. 608; Llewellin *v.* Cobbold, 1 Sm. & G. 376; Downes *v.* Jennings, 32 Beav. 290. See Loader *v.* Clark, 2 Mac. & G. 387; Chambers *v.* Crabbe, 34 Beav. 457. A secret settlement by a woman of her property during a treaty of marriage, is not necessarily void at law. Doe *d.* Richards *v.* Lewis, 11 C. B. 1035.

* Tucker *v.* Andrews, 13 Mc. 124; Ramsay *v.* Joyce, 1 McMullan's Ch. 236; Black *v.* Jones, 1 A. K. Marsh. 312; Manes *v.* Durant, 2 Rich. Eq. 404; Linker *v.* Smith, 4 Wash. C. C. 224.

There is no distinction whether the conveyances be to children or to a stranger. Ramsay *v.* Joyce, 1 McMullan's Ch. 236.

A conveyance made by a woman in discharge of the moral duty of providing for the children of a former marriage, is not considered a fraud upon the intended husband, although it is concealed from him. Green *v.* Goodall, 1 Cold. 404.

to have been thought material as negativing the imputed fraud: such, for instance, as the poverty of the husband, the fact that he has made no settlement on the wife, the fulfilment of a moral obligation, as in the case of a settlement upon the children of a former marriage, or of a bond given to secure a debt contracted for a valuable consideration, or the fact of the ignorance of the husband that his wife possessed the property.[1] There can be no doubt that any of these facts would be a good ground for insisting that there should be a settlement, but it is not so easy to understand why they should constitute reasons for practising concealment upon him, or for treating such concealment as immaterial.[2] If both the property and the mode of its conveyance, pending the marriage treaty, were concealed from the intended husband, there still is or may be a fraud practised on him. It is true that the non-acquisition of the property is no disappointment, but still his legal right is defeated, and the conveying away of the property for the benefit of a third person, or the vesting and continuance of a separate power in the wife over property which ought to have been his, and which is, without his consent made independent of his control, is a surprise upon him, and might, if previously known, have induced him to abstain from the marriage.[3] The mere fact, however, of concealment, or rather the non-communication to him, is not necessarily, and under all circumstances, equivalent to fraud. In the absence of any representation as to specific property, there is no implied contract on the part of the lady that her property shall not be in any way diminished before the marriage: but it is for the court to determine in each case whether having regard to the

[1] Hunt *v.* Matthews, 1 Vern. 408; Taylor *v.* Pugh, 1 Ha. 608. See Downes *v.* Jennings, 32 Beav. 290.

[2] England *v.* Downs, 2 Beav. 522, 529; Taylor *v.* Pugh, 1 Ha. 608, 613; Chambers *v.* Crabbe, 34 Beav. 457. See Poulson *v.* Wellington, 2 P. Wms. 533; Lady Strathmore *v.* Bowes, 2 Bro. C. C. 345, 6 Bro. P. C. 427, 1 Ves. Jr. 22.

[3] Carleton *v.* Earl of Dorset, 2 Vern. 17; Goddard *v.* Snow, 1 Russ. 485; England *v.* Downs, 2 Beav. 522, 529; Downes *v.* Jennings, 32 Beav. 290.

condition of the parties and the other attendant circumstances, a transaction complained of by the husband should be treated as fraudulent.[1] * Where the husband has so conducted himself towards the intended wife that she cannot without disgrace retire from the marriage, as where he had induced her to cohabit with him before marriage, a settlement made by her of her property without his knowledge, will not be treated as in fraud of his marital rights.[2]

The equity in favor of the husband does not arise, unless it can be clearly made out that at the time of the conveyance of her property by the wife there was an engagement of marriage between them.[3] A conveyance to be fraudulent must be made in contemplation of a particular marriage.[4] Nor has the husband any equity to set it aside, if before the marriage he has notice that the intended wife has dealt in some way with her property. It is essential to the application of the principle that the husband should, up to the moment of the marriage, have been kept in ignorance of the transaction. If he has notice before the marriage that the lady intended to make a settlement of her property, and nothing took place to justify a belief on his part, that at the time of the marriage no such settlement had been made, he has no equity to set it aside, although he may not be proved to have been aware of any settlement having been actually made. If the husband has notice that the property has been in some way dealt with and makes no inquiry, he is bound by what has been done. It is enough that he had notice of the intended settlement, though he may not have been aware of the trusts.[5]

[1] De Manneville *v.* Compton, 1 V. & B. 354; St. George *v.* Wake, 1 M. & K. 310; Taylor *v.* Pugh, 1 Ha. 608.

[2] Taylor *v.* Pugh, 1 Ha. 608.

[3] England *v.* Downs, 2 Beav. 522; Griggs *v.* Staplee, 2 Deg. & S. 572.

[4] Maber *v.* Hobbs, 2 Y. & C. 317.

[5] St. George *v.* Wake, 1 M. & K. 610;

* Caldwell *v.* Gillis, 2 Port. 526; Crump *v.* Dudley, 3 Call. 507; M'Clure *v.* Miller, 1 Bailey's Ch. 107.

If a bond be given by a woman before marriage to secure a debt contracted for valuable consideration, there is no fraud on the husband though it be concealed from him.[1]

The right of the husband to impeach a transaction, as being in fraud of his marital rights, may be lost by acquiescence or delay;[2] nor have his representatives after his death any equity against the wife, if he does not before his death discover the fraud upon his marital rights.[3]*

MARRIAGE AND PLACE BROKAGE BONDS.

Another class of transactions which are relieved against as being in fraud of third parties, are contracts or agreements to negotiate a marriage between two parties for a certain compensation.[4] In some early cases, Grisley *v.* Lother,[5] and a case

England *v.* Downs, 2 Beav. 522; Griggs *v.* Staplee, 2 Deg. & S. 572, Wrigley *v.* Swainson, 3 Deg. & S. 458. See Prideaux *v.* Lonsdale, 1 D. J. & S. 433.

[1] Blanchet *v.* Foster, 2 Ves. 264.

[2] De Manneville *v.* Compton, 1 V. & B. 354; Loader *v.* Clarke, 2 Mac. & G. 382; Downes *v.* Jennings, 32 Beav. 290. See *infra*.

[3] Grazebrook *v.* Percival, 14 Jur. 1103.

[4] See Worsley *v.* De Mattos, 1 Burr. 476, *per* Lord Mansfield.

[5] Hob. 10.

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* A conveyance made by a man in contemplation of marriage, for the purpose of defrauding his wife, is void. Petty *v.* Petty, 4 B. Mon. 215; Swain *v.* Perine, 5 Johns. Ch. 482; Smith *v.* Smith, 2 Halst. Ch. 515; Dearman *v.* Dearman, 10 Ind. 191; Tate *v.* Tate, 1 Dev. & Bat. Eq. 22.

There can be no doubt of the power of a husband to dispose absolutely of his property during his life independently of the concurrence, and exonerated from any claim of his wife, provided the transaction is not merely colorable and be unattended with circumstances indicative of fraud upon the rights of the wife. If the disposition by the husband be *bonâ fide*, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her. Dunnock *v.* Dunnock, 3 Md. Ch. 140; Cameron *v.* Cameron, 10 Smed. & Mar. 394; Lightfoot *v.* Colgin, 5 Munf. 42; Stewart *v.* Stewart, 5 Ct. 317; Holmes *v.* Holmes, 3 Paige, 363.

If the disposition of the property by the husband is a mere device or contrivance by which, not parting with the absolute dominion over the property during his life, he seeks at his death to deny his widow the share in his estate which the law assigns to her, it will be ineffectual against her. Hays *v.* Henry, 1 Md. Ch. 337; Thayer *v.* Thayer, 14 Vt. 107; Reynolds *v.* Vance, 1 Heisk. 344.

cited in Hall *v.* Potter,[1] a marriage brokage bond was held good at law; but these cases cannot be considered law. The better opinion would seem to be that a marriage brokage bond is void at law upon grounds of public policy. In equity it has long been settled that such bonds will be relieved against, as well upon grounds of public policy, as because they tend to induce the exercise of undue influence in the promotion of marriages, and are a fraud on the families of those who are so induced to marry without taking the advice of their friends.[2] Marriage brokage contracts are so adverse to public policy as not to be capable of confirmation;[3] and even money paid under them may be reclaimed.[4] It makes no difference that the marriage is between persons of equal rank, age, and fortune, for the contract is equally open to objection upon general principles as being of dangerous consequence.[5] The principle has even gone further, and a bond given for assisting a clandestine marriage has been set aside, though given voluntarily after the marriage and without any previous agreement for the purpose.[6]

Upon a similar ground, if a parent or guardian, or any person nearly connected to a party, privately connive with a third person, and agree to procure a marriage between such parties in consideration of a certain compensation, or agree upon payment of a certain sum to consent to such marriage, the contract is utterly void upon the ground that it is a bar-

[1] 3 Lev. 412.

[2] Hall *v.* Potter, 3 Lev. 412, Show. P. C. 76; Arundel *v.* Trevillian, 1 Ch. Rep. 47; Law *v.* Law, Ca. t. Talb. 140, 142; Cole *v.* Gibson, 1 Ves. 503; Vauxhall Bridge Co. *v.* Spencer, Jac. 67; Boynton *v.* Hubbard, 7 Mass. (Amer.), 112. The civil law does not seem to have held contracts of this sort in such severe rebuke, for it allowed *proxenetæ*, or match-makers, to receive a reward for their services to a limited extent. Story's Eq. Jur. 260.

[3] Cole *v.* Gibson, 1 Ves. 503, 506, 507; Roche *v.* O'Brien, 1 Ba. & Be. 358.

[4] Smith *v.* Bruning, 2 Vern. 392; Goldsmith *v.* Bruning, 1 Eq. Ca. Ab. 89.

[5] Hall *v.* Potter, 3 Lev. 411, 1 Fonb. bk. 1, c. 4, § 10.

[6] Williamson *v.* Gibson, 2 Sch. & Lef. 357.

gain in contravention of the rights of third parties, whose interests are thus controlled and sacrificed.[1]

Of a kindred nature to marriage brokage contracts, and governed by the same rule, are cases where bonds are given, or other agreements made as a reward for using influence and power over another person to induce him to make a will in favor of the obligee and for his benefit, for all such contracts tend to the deceit and injury of third parties, and encourage artifice and improper attempt to control the exercise of their free judgment.[2] But such cases are carefully to be distinguished from those in which there is an agreement among heirs or other near relatives to share the estate equally between them, whatever may be the will made by the testator; for such an agreement is generally made to suppress fraud and undue influence, and cannot truly be said to disappoint the testator's intention, if he does not impose any restriction on his devisee.[3]

Of a kindred nature to marriage brokage contracts are office brokage bonds. Bonds of this sort are fraudulent, and, therefore, void upon grounds of public policy, the tendency of such bonds being to introduce unfit persons into places of great public trust, and to defraud the public of the service of the most efficient candidates or officers.[4]

BONDS TO MARRY.

A bond given by a young woman secretly to a man, conditioned to pay him a sum of money, if she did not marry him on the death of the parent or other individual from whom she has expectancies, but kept secret from him, is in equity looked

[1] Peyton *v.* Bladwell, 1 Vern. 240; Stribblehill *v.* Brett, 2 Vern. 445; Keat *v.* Allen, *ib.* 588, 1 Fonb. Eq. bk. 1, c. 4, § 11; Story's Eq. Jur. 266, 267.

[2] Debenham *v.* Ox, 1 Ves. 276.

[3] Beckley *v.* Newland, 2 P. Wm. 181; Harwood *v.* Tooke, 2 Sim. 192; Wethered *v.* Wethered, *ib.* 183; Story's Eq. Jur. 265, 785.

[4] Law *v.* Law, Ca. t. Talb. 140, 3 P. Wms. 391; Morris *v.* M'Culloch, 2 Eden, 190; Hannington *v.* Du Chatel, 1 Bro. C. C. 124; Hartwell *v.* Hartwell 4 Ves. 811; Osborne *v.* Williams, 18 Ves. 379.

on as a fraud on the parent or other individual, from whom she has expectations, who disapproved of the marriage, and might be misled into making a provision for her, which, had he known of the bond, he might have done in such a manner as would have prevented the marriage.[1]

FRAUD IN WITHHOLDING CONSENT TO MARRIAGE.

Gifts and legacies are often bestowed upon persons upon condition that they shall not marry without the consent of parents, guardians, or other confidential persons. If such consent to the marriage is withheld from a corrupt motive, the Court of Chancery may interfere. It has been contended that if the person whose consent is required is interested in withholding it, he must show a reason for his dissent. But if the author of the trust chooses to require the consent of a person whom he knows at the time to have an interest in refusing it, it is difficult to conceive an equity interfering with his choice. At all events no equity will arise if the trustee has meant to act honestly, though his decision may not be the same as that at which the court would have arrived.[2]

FRAUD IN RESPECT OF EXPECTANCIES.

It would appear to have been partly, if not mainly, on the ground that a bargain with an expectant heir in respect of his expectancy during the life, and without the knowledge of the person from whom the expectancy was looked for, was a fraud on the latter, that a bargain with an expectant heir was liable to be opened and set aside upon the ground merely of undervalue.[3] A fair and *bonâ fide* agreement, however, between expectants to share equally, or in a certain manner, the prop-

[1] Woodhouse *v.* Shepley, 2 Atk. 536; Cock *v.* Richards, 10 Ves. 429.
[2] Clarke *v.* Parker, 19 Ves. 1.
[3] Davis *v.* Duke of Marlborough, 2 Sw. 140, 147; King Hamlet, 2 M. & K. 456. But see now 31 Vict. c. 4, *supra*, p. 187 n.

erty which might be left them, although entered into behind the back of the person from whom the expectancy is looked for, has always been held valid in equity.[1]

FRAUD IN RESPECT OF SALES BY AUCTION.

Agreements whereby parties for the purpose of preventing competition at an auction, and of depressing the value of the property below its market price, engage not to bid against each other, have been held in some American cases to operate as a fraud upon third parties.[2] * But it is difficult to see upon what principle it can be maintained that a mere agreement between two persons, each desirous of effecting the purchase of an

[1] Beckley *v.* Newland, 2 P. Wms. 182; Wethered *v.* Wethered, 2 Sim. 183; Harwood *v.* Tooke, *ib.* 192; Hyde *v.* White, 5 Sim. 524; Lyde *v.* Mynn, 1 M. & K. 683. See Houghton *v.* Lees, 1 Jur. N. S. 862; Heap *v.* Tonge, 9 Ha. 100.

[2] Jones *v.* Caswell, 3 Johns. (Amer.) 29; Doolin *v.* Ward, 6 Johns. (Amer.) 194; Wilbur *v.* How, 8 Johns. (Amer.) 444; Hawley *v.* Cramer, 4 Cow. (Amer.) 717; Brisbane *v.* Adams, 3 Comst. (Amer.) 129; Story's Eq. Jur. 293. See also Fuller *v.* Abrahams, 6 Moo. 316.

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* Troup *v.* Wood, 4 Johns. Ch. 228; Grant *v.* Lloyd, 12 Smed. & Mar. 191; Martin *v.* Ranlett, 5 Rich. 541; Wooten *v.* Hinkle, 20 Mo. 290; Dudley *v.* Little, 2 Ohio, 508; Platt *v.* Oliver, 1 McClenn, 295; Gulick *v.* Ward, 5 Halst. 87; Martin *v.* Blight, 4 J. J. Marsh. 491.

The law does not tolerate any influence likely to prevent competition at judicial sales, and it accords to every debtor the chances for a fair sale and full price. Cocks *v.* Izard, 7 Wall. 559.

It is essential to the validity of tax sales, not merely that they should be conducted in conformity to the requirement of law, but that they should be conducted with entire fairness. Perfect freedom from all influence likely to prevent competition in the sale should be strictly exacted. Slater *v.* Maxwell, 6 Wall. 268.

A sale of real estate *en masse*, instead of in separate parcels, will only be set aside upon the ground of fraud or prejudice to some one's rights. Rose *v.* Mead, 5 Gilman, 171.

The mere fact that the purchase was made by an association formed for the purpose of bidding, does not make a sale void. If the object and purpose of the association are, not to prevent competition, but to enable, or as an inducement to, the persons composing it to participate in the bid-

estate, that they will not bid against each other, but that one shall retire and leave the field open to the other, can be held to invalidate the sale, and in two cases before our own courts, an agreement to this effect has been held good.[1]

The secret employment by the owner of property of a puffer, or underbidder, at a sale by auction of the property, is at law a fraud upon *bonâ fide* bidders; nor can the owner bid privately for his own property. All secret dealing on the part of the seller is deemed fraudulent. If he be unwilling that his goods shall be sold at an under price, he may order them to be set up at his own price or not lower, or he may previously declare as a condition of the sale, that it is subject to a reserved price.[2]* In equity, however, a vendor could lawfully, without

[1] Galton *v.* Emuss, 1 Coll. 243; Re Carew's Estate, 26 Beav. 187. See also Phippen *v.* Stickney, 3 Metc. (Amer.) 384; Snell *v.* Jones, 6 Serj. & R. (Amer.) 122.

[2] Bexwell *v.* Christie, Cowp. 395; Howard *v.* Castle, 6 T. R. 642; Thornett *v.* Haines, 15 M. & W. 367; Green *v.* Baverstocke, 14 C. B. N. S. 204.

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ding, the sale will be upheld. Kearney *v.* Taylor, 15 How. 494; Goode *v.* Hawkin, 2 Dev. Eq. 393; Smith *v.* Greenlee, 2 Dev. 126; Smull *v.* Jones, 1 M. & S. 128; Phippen *v.* Stickney, 3 Met. 387; *contra*, Thompson *v.* Davis, 13 Johns. 112; Dudley *v.* Little, 1 Ohio, 503; Switzer *v.* Skiles, 3 Gilman, 529; Wolf *v.* Luyster, 1 Hall, 146.

A purchaser who uses unfair means to prevent competition cannot hold the property. Newman *v.* Meek, 1 Freeman's Ch. 441; Johnston *v.* La Motte, 6 Rich. Eq. 347; Plaster *v.* Burger, 5 Ind. 232.

It is no fraud for a purchaser to declare that he intends to give the property to the debtor, or let him redeem, when such is really his intention. To make a purchase void, it must be proved that the property was obtained at an undue value and by a false representation. Dick *v.* Cooper, 24 Penn. 217; Benedict *v.* Gilman, 4 Paige, 58; Brown *v.* Lynch, 1 Paige, 147.

* Towle *v.* Leavitt, 23 N. H. 360; Moncrieff *v.* Goldsborough, 4 H. & Mc. H. 281; Wolf *v.* Luyster, 1 Hall, 146; Wood *v.* Hall, 1 Dev. Eq. 411; Staines *v.* Shores, 16 Penn. 200; Trust *v.* Delaplaine, 3 E. D. Smith, 219; Donaldson *v.* M'Roy, 1 Brown, 346; Smith *v.* Greenlee, 2 Dev. 126; Jenkins *v.* Hogg, 2 Const. R. 821; Baham *v.* Bach, 13 La. 287; Woods *v.* Hall, 13 La. 411; Morehead *v.* Hunt, 1 Dev. & Bat. Eq. 35.

any express stipulation, or without making the fact publicly known, fix a reserved price and employ a person to bid for him, so as to prevent the property going under that price; but if more than one person be employed to bid, or if the object of the employment of a bidder be to run up and enhance the price, or if the sale profess to be without reserve and a bidder be nevertheless employed, there is a fraud in equity as well as at law.[1] Lord Cranworth, in Mortimer *v.* Bell,[2] and Knight Bruce, L. J., in Woodward *v.* Miller,[3] animadverted upon the inconvenience of there being a conflict between the rules at law and equity upon the subject, and said they considered the rule at law more salutary than the rule which had been adopted by courts of equity. With the view accordingly of obviating this inconvenience in the case of sales by auction of land, and of assimilating the rules of law and equity, it has been lately enacted by 30 & 31 Vict. c. 48, that particulars or conditions of sale by auction of land shall state whether the sale be with or without reserve; and that, if the sale is stated to be without reserve, the seller may not employ any person for him;[4] but that, if the sale is stated to be subject to a reserved price, the seller, or any person named on his behalf, may bid.[5] The statute does not affect any species of property other than land.

VOLUNTARY CONVEYANCES IN FRAUD OF SUBSEQUENT PURCHASERS.

Another class of frauds upon third parties is that of volun-

[1] Smith *v.* Clarke, 12 Ves. 477; Woodward *v.* Miller, 2 Coll. 279; Robinson *v.* Wall, 2 Ph. 372; Flint *v.* Woodin, 9 Ha. 618.

[2] L. R. 1 Ch. App. 10.

[3] 2 Coll. 279.

[4] Sec. 5.

[5] Sec. 6.

An auctioneer cannot make fictitious bids. Veazie *v.* Williams, 8 How. 134.

An auctioneer who sells below the sum fixed by the vendor, is liable for the difference. Steele *v.* Ellmaker, 11 S. & R. 86.

tary conveyances of real estate in regard to subsequent purchasers. By the 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18, § 31, all conveyances, &c., of any hereditaments for the intent and purpose to deceive purchasers are made void as against them.[1] Courts of equity had jurisdiction in the matter long before the statute. The act has not defeated the jurisdiction, but only gives a more clear and distinct jurisdiction, and a more extended remedy.[2] A voluntary conveyance, is, by the statute, void as against a subsequent purchaser, although it may have been *bonâ fide* and for good consideration, and although the purchaser may have had full notice of the voluntary conveyance. The statute in every such case infers fraud, and will not allow the presumption to be rebutted.[3] * A voluntary conveyance will not be supported against a subsequent

[1] See Perry Herrick *v.* Attwood, 2 D. & J. 21.
[2] *Ib.*
[3] Taylor *v.* Stile, cit. Sug. V. & P 714; Evelyn *v.* Templar, 2 Bro. C. C. 148; Doe *v.* Manning, 9 East, 59; Pulvertoft *v.* Pulvertoft, 18 Ves. 84, 86; Buckle *v.* Mitchell, *ib.* 100; Kelson *v.* Kelson, 10 Ha. 385; Daking *v.* Whimper, 26 Beav. 568; Clarke *v.* Wright, 6 H. & N. 849.

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* Clanter *v.* Burgess, 2 Dev. Eq. 13; Freeman *v.* Eatman, 3 Ired. Eq. 81; Anderson *v.* Green, 7 J. J. Marsh. 448; Barrincass *v.* M'Murray, 3 Brevard, 204; Carter *v.* Cartlebury, 5 Ala. 377; Latter *v.* Morrison, 1 Ired. 149; Elliott *v.* Horn, 10 Ala. 348; Ricker *v.* Ham, 14 Mass. 137; Clapp *v.* Tirrell, 20 Pick. 247; Tate *v.* Leggatt, 2 Leigh, 84; Bell *v.* Blaney, 2 Murph. 181.

The received construction in England of the British statutes at the time of our separation from the British empire, may be considered as accompanying the statutes and forming an integral part of them. Subsequent decisions are entitled to respect, but are not absolute authority. At the commencement of the American Revolution the construction of the statute of 27th Elizabeth was not settled. The principle adopted in this country in continuing the statute, is, that a subsequent sale without notice by a person who has made a settlement not on valuable consideration, is presumptive evidence of fraud, and throws on the person claiming under such settlement the burden of proving that it was made *bonâ fide*. Catheart *v.* Robinson, 5 Pet. 264; Lyne *v.* Bank of Kentucky, 5 J. J. Marsh. 545; Ver-

purchaser, even although it may have been made by the direction of the court.[1] A purchaser cannot, however, avail himself of the provisions of the statute unless he has purchased *bonâ fide* and for a valuable consideration. The consideration must

[1] Martin *v.* Martin, 2 R. & M. 507; Dart, V. & P. 576.

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planck *v.* Sterry, 12 Johns. 536; s. c. 1 Johns. Ch. 260; Bank of Alexandria *v.* Patton, 1 Rob. 499; Lancaster *v.* Dolan, 1 Rawle, 231; Footman *v.* Pendergrass, 3 Rich. Eq. 33; Corprew *v.* Arthur, 15 Ala. 525; Mayor & City Council of Baltimore *v.* Williams, 6 Md. 235; Fowler *v.* Stoneum, 11 Tex. 478; Wells *v.* Treadwell, 28 Miss. 717; Brown *v.* Bucks, 22 Geo. 574; Gardner *v.* Booth, 31 Ala. 136; Gardner *v.* Cole, 21 Iowa, 205; Jackson *v.* Town, 4 Cowen, 603; Seward *v.* Jackson, 8 Cow. 406; Wickes *v.* Clarke, 8 Paige, 165; Beal *v.* Warren, 2 Gray, 446; Salmon *v.* Bennett, 1 Ct. 525.

The act does not apply to conveyances made by the State, because it operates upon the intent of the person conveying, and the State cannot legally be said to intend to defraud any person. Dodson *v.* Cooke, 1 Overton, 314.

The same circumstances which would render a deed fraudulent if the grantor had owned the legal estate, likewise render it fraudulent considered as a mere assignment of his equity. The claimant of an equity whose claim is based upon a valuable consideration, must prevail over a prior claim to the same equity based upon a good consideration merely. Lyne *v.* Bank of Kentucky, 5 J. J. Marsh. 545.

To make a voluntary conveyance void, it must be covinous and fraudulent, and not voluntary merely, and the evidence of fraud must be pointed. Clayton *v.* Brown, 17 Geo. 217; Cooke *v.* Kell, 13 Md. 469.

The doctrine only applies where both conveyances are made by the same person. Russell *v.* Kearney, 27 Geo. 96; Bell *v.* McCauley, 29 Geo. 355.

A voluntary conveyance without actual fraud is valid against a subsequent purchaser for valuable consideration with notice of the prior conveyances. Bank of Alexandria *v.* Patton, 1 Rob. 499; Anderson *v.* Green, 7 J. J. Marsh. 448; Foster *v.* Walton, 5 Watts, 378; Hudnal *v.* Wilder, 4 McCord, 294; Footman *v.* Pendergass, 3 Rich. Eq. 33; Frisbie *v.* McCarty, 1 Stew. & Port. 68; Mayor & C. C. of Baltimore *v.* Williams, 6 Md. 235; Dougherty *v.* Jack, 5 Watts, 456; Speise *v.* McCoy, 6 W. & S 485; Moultrie *v.* Jennings, 2 McMullan, 508; Howard *v.* Williams, 1 Bailey, 575; Sanger *v.* Eastwood, 19 Wend. 514; Shaw *v.* Levy, 17 S. & R. 99; Tate *v.* Liggatt, 2 Leigh, 84; Hiatt *v.* Wade, 8 Ired. 340; Brown *v.* Buck, 22 Geo. 574; Chaffin *v.* Kimball, 23 Ill. 36; Coppage *v.* Barnett, 34 Miss. 621; Enders *v.* Williams, 1 Met. (Ky.) 346; Aiken *v.* Bruen, 21 Ind. 137.

not be so small as to be palpably fraudulent.[1]* In order that a subsequent conveyance for value should defeat a prior voluntary conveyance, it is also essential that both conveyances should be made by the same person. An heir or devisee cannot by a conveyance for value defeat a voluntary settlement made by his ancestor or testator;[2] nor will equity interfere in favor of a subsequent purchaser, where the voluntary grantee has conveyed it to a *bonâ fide* purchaser for value, or a person has intermarried with the voluntary grantee, on the faith of the voluntary deed, before the *bonâ fide* purchaser from the voluntary grantee acquired his title.[3]†

A contract to sell the settled estate to a person with full notice of the voluntary settlement, will be enforced at the suit

[1] Humphreys *v.* Pensam, 1 M. & C. 580; Roberts *v.* Williams, 4 Ha. 130: Kelson *v.* Kelson, 10 Ha. 385; Sug. V. & P. 713.

[2] Parker *v.* Carter 4 Ha. 409; Doe *v.* Rusham, 17 Q. B. 723; Lewis *v.* Rees, 3 K. & J, 132

[3] Sug. V. & P. 720, 721.

A record of a deed is constructive notice to all subsequent purchasers. Cooke *v.* Kell, 13 Md. 469; Bell *v.* Blaney, 2 Murph. 171; Cain *v.* Jones, 5 Yerg. 249; Bank of Alexandria *v.* Patton, 1 Rob. 499; Lancaster *v.* Dolan, 1 Rawle, 231; M'Neely *v.* Rucker, 6 Blackf. 391; *contra*, Lewis *v.* Love, 2 B. Mon. 345; Enders *v.* Williams, 1 Met. (Ky.) 346.

When a deed is actually fraudulent, the constructive notice arising from recording will not defeat the right of a subsequent purchaser. Gardner *v.* Cole, 21 Iowa, 205.

* Fullenwider *v.* Roberts, 4 Dev. & Bat. 278: Tate *v.* Tate, 1 Dev. & Bat. Eq. 22.

No man is a subsequent purchaser except him to whom a conveyance has been executed for a valuable consideration, by which there is conveyed to him an estate in the premises either of freehold or for years or some rent or profit therein. A covenant to convey is no such sale as constitutes the covenantee a subsequent purchaser. He must have a legal title such as he can enforce at law, and not a mere equity. Hopkins *v.* Webb, 9 Humph. 519.

† Anderson *v.* Green, 7 J. J. Marsh. 448; Sterry *v.* Arden, 1 Johns. Ch. 260.

of the purchaser;[1] but the seller cannot compel a specific performance of the contract.[2] A trust created by a voluntary settlement will be carried into execution until sale; but an injunction will not be granted restraining the settler from defeating the settlement by a sale,[3] nor will the pendency of a suit prevent the settler from selling the property, or the purchaser from filing a bill in order to enforce his rights under the contract.[4] When a voluntary settlement is avoided by a subsequent sale, the volunteers have no equity against the purchase money payable to the settler.[5]

As between the parties themselves, and as against other voluntary grantees of the same estate, voluntary conveyances are binding.[6] * A voluntary settlement will be defeated by a conveyance or settlement for value only to the extent necessary to give effect to the conveyance or settlement for value.[7] As between two volunteers, the conveyance which is prior in date will prevail, if it be *bonâ fide*.[8] A subsequent volunteer cannot, by selling for value, confer any title on a purchaser as against a grantee of the same estate who is prior in date.[9] A judgment creditor not being a purchaser within the meaning of the statute, has no title on that ground to set aside a prior voluntary settlement.[10] † Though a settlement may appear on

[1] Buckle *v.* Mitchell, 18 Ves. 100; Currie *v.* Nind, 1 M. & C. 17; Willats *v.* Busby, 5 Beav. 193; Lister *v.* Turner, 5 Ha. 291; Sug. V. & P. 720.

[2] Smith *v.* Garland, 2 Mer. 123; Johnson *v.* Legard, T. & R. 281.

[3] Pulvertoft *v.* Pulvertoft, 18 Ves. 84.

[4] Metcalfe *v.* Pulvertoft, 1 V. & B. 180; Sug. V. & P. 721.

[5] Daking *v.* Whimper, 26 Beav. 568.

[6] Bill *v.* Cureton, 2 M. & K. 503; Doe *v.* Rusham, 17 Q. B. 723; Lewis *v.* Rees, 3 K. & J. 132.

[7] Croker *v.* Martin, 1 Bligh's N. S. 573.

[8] Doe *v.* Rusham, 17 Q. B. 723; Lewis *v.* Rees, 3 K. & J. 132.

[9] *Ib.*

[10] Beavan *v.* Lord Oxford, 6 D. M. & G. 507.

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* Tate *v.* Tate, 1 Dev. & Bat. Eq. 22; Clapp *v.* Tirrell, 1 Pick. 247.

† There is no material difference between a judicial sale and a private sale. Reynolds *v.* Vilas, 8 Wis 471; Latta *v.* Morrison, 1 Ired. 149; *contra*, Ridgway *v.* Underwood, 4 Wash. 129.

its face to be voluntary, evidence is admissible to prove that it was made for valuable consideration.[1] In the case of deeds alleged to be voluntary, the court does not enter into the *quantum* of consideration; but only inquires whether the transaction was one of bargain or one of gift merely.[2] In a case where an agreement was entered into between a lady, entitled in fee to an estate subject to mortgages, and her nephew, that she should come and live with him, and that he should remove into a larger house, and he covenanted to indemnify her from all liability in respect of the mortgages, and fulfilled his own part of the agreement, it was held that the settlement was not voluntary, the covenant to indemnify, and the expenses incurred by the nephew on the faith of the

[1] Kelson *v.* Kelson, 10 Ha. 385; Townend *v.* Toker, L. R. 1 Ch. App. 459.

[2] Townend *v.* Toker, L. R. 1 Ch. App. 459.

A purchaser from an executor is within the statute. Clapp *v.* Leatherbee, 18 Pick. 131.

A mortgagee is a purchaser for a valuable consideration. Lewis *v.* Love, 2 B. Mon. 345; Lancaster *v.* Dolan, 1 Rawle, 231; Freeman *v.* Lewis, 5 Ired. 91; Potts *v.* Blackwell, 3 Jones' Eq. 449; s. c. 4 Jones' Eq. 58; Ledgard *v.* Butler, 9 Paige, 132.

A deed made exclusively with the design to defraud creditors can not be considered as having been made with the design to defraud purchasers. Foster *v.* Walton, 5 Watts, 378; Shaw *v.* Levy, 17 S. & R. 99; Douglass *v.* Dunlap, 10 Ohio, 162; Sanger *v.* Eastwood, 19 Wend. 514; Teasdale *v.* Atkinson, 2 Brevard, 48; Woodman *v.* Bodfish, 25 Me. 317; Fowler *v.* Stoneum, 11 Tex. 478; Moseley *v.* Moseley, 15 N. Y. 334; Doolittle *v.* Lyman, 44 N. H. 608; Stevens *v.* Morse, 247 N. H. 532.

If there is any fraud in a voluntary conveyance, or it is merely colorable, it can never be set up against a subsequent purchaser for a valuable consideration. Clapp r. Leatherbee, 18 Pick. 131; Ricker *v.* Ham, 14 Mass. 137; Kimball *v.* Hutchins, 3 Ct. 450; Eddins *v.* Wilson, 1 Ala. 237; Carter *v.* Castleberry, 5 Ala. 377; Fullenwider *v.* Roberts, 4 Dev. & Bat. 278; Walter *v.* Cralle, 8 B. Mon. 11; How *v.* Waysman, 12 Mo. 169.

settlement being nominally sufficient to support it as made for value.[1]

Prenuptial settlements, and postnuptial settlements in pursuance of prenuptial articles, or on receipt of an additional portion, &c., &c., are settlements for valuable consideration, and are therefore good against subsequent purchasers or prior voluntary grantees, as the case may be.[2]* So also, in certain cases, the concurrence of a stranger may deprive a postnuptial settlement of its voluntary character;[3] but as a general rule a postnuptial settlement is voluntary.[4] The marriage considerations run through the whole settlement, as far as it relates to the husband, and wife, and issue; but does not extend to remainders to collateral relations, so as to support them against a subsequent sale to a *bonâ fide* purchaser.[5] A marriage settlement so far as it is made in favor of collaterals, is voluntary, and therefore fraudulent and void as against subsequent purchasers, though made honestly and openly to provide for the settler's wife and children,[6] or his mother and younger brothers and sisters,[7] or for a niece and adopted daughter.[8] No moral consideration, however strong, is sufficient to support a settlement against a purchaser;[9] but if the remainders are specifically contracted for, and brought within the consideration,[10] or if the limitation in the settlement so interfere with those which would naturally be made in favor of the husband, wife, and issue, that it must be presumed to have been agreed upon by all parties as part of the marriage con-

[1] Townend *v.* Toker, L. R. 1 Ch. App. 459.
[2] Sug. V. & P. 718; Dart's V. & P. 576.
[3] Dart's V. & P. 576, 577.
[4] Sug. V. & P. 715.
[5] Johnson *v.* Legard, 6 M. & S. 60; T. & R. 281; Sug. V. & P. 716.
[6] Chapman *v.* Emery, Cowp. 278, 280.
[7] Doe *v.* Manning, 9 East, 59.
[8] Smith *v.* Cherrill, L. R. 4 Eq. 390.
[9] But see Clarke *v.* Wright, 6 H. & N. 872, *per* Cockburn, C. J.
[10] Sug. V. & P. 716.

* Verplanck *v.* Sterry, 12 Johns. 536; s. c. 1 Johns. Ch. 260.

tract, it is not voluntary, and will be supported against a subsequent purchaser.[1]*

The statute 27 Eliz. c. 4, further makes void as against subsequent purchasers for money or other good consideration all conveyances made with any clause, provision, article, or condition of revocation, determination or alteration at the grantor's will or pleasure, whether such clause, &c., &c., extend to the whole interest actually conveyed or only partially affect it.[2]

The statute 27 Eliz. c. 4, does not apply to personal chattels.[3]*

A purchaser for value of real estate cannot come into the Court of Chancery to have a prior voluntary deed void under 27 Eliz. c. 5, delivered up to be cancelled. The court, in such a case, leaves both parties to their legal rights and remedies.[4]

NOTICE.

Another class of frauds upon third parties consists of cases where a man takes or purchases property with notice of the

[1] Clarke *v.* Wright, 6 H. & N. 869, *per* Blackburn and Willes, JJ.; Dart's V. & P. 578–581; but see 6 H. & N. 869, *per* Williams, J.

[2] Burt Real Prop. §. 224. See further on this subject Sug. V. & P. 721; Dart's V. & P. 584.

[3] Jones *v.* Croucher, 1 Sim. & St. 315; Bill *v.* Cureton, 2 M. & K 503; Barton *v.* Vanheythuysen, 11 Ha. 126.

[4] De Hoghton *v.* Money, 35 Beav. 98.

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* Davis *v.* Bigler, 62 Penn. 242; Teasdale *v.* Atkinson, 2 Brevard, 48; Sewall *v.* Gliddon, 1 Ala. 52; Bohn *v.* Headley, 7 H. & J. 257; Garrison *v.* Rives, 3 Jones, 85; Jones *v.* Hall, 5 Jones' Eq. 26.

Although the terms of the act apply only to land, yet, being declaratory of the common law, they must be interpreted as defining the nature and effect of fraudulent conveyances, generally, in its letter, as enacting the common law as to fraud relating to land, but in its spirit sanctioning and sustaining the condemnation passed by the common law upon all frauds. Gibson *v.* Love, 4 Fla. 217; Footman *v.* Pendergrass, 3 Rich. Eq. 33.

If the vendee allows personal property to remain in the possession of

legal or equitable title of other persons to the same property, and seeks to defeat their just rights by appropriating the property to his own use. In equity notice affects the conscience. A man who takes or purchases property cannot protect himself against claims, of which he has notice, to the same property. If a man acquiring property has at the time of the acquisition notice of an equity binding the person from whom he takes, in respect of the property, he is bound to the same extent and in the same manner by the same equity.[1] * In accordance with this principle the purchaser of property from a trustee, with notice of the trust, is himself a trustee for the same property;[2] the purchaser of property which the vendor has contracted to sell, is, if he has notice of the contract, bound by the same equity by which the vendor whom he represents was bound;[3] the purchaser of property with notice of an equitable lien for unpaid purchase-money,[4] or of an equitable mortgage by deposit of deeds,[5] is bound by the equity to which his vendor was liable; and the purchaser of

[1] Taylor *v.* Stibbert, 2 Ves. Jr. 437; Dunbar *v.* Tredennick, 2 Ba. & Be. 310.

[2] Saunders *v.* Dehew, 2 Vern. 271; Allen *v.* Knight, 5 Ha. 272; 11 Jur. 527; Carter *v.* Carter, 3 K. & J. 617; Cory *v.* Eyre, 1 D. J. & S. 149.

[3] Taylor *v.* Stibbert, 2 Ves. Jur. 438; Scott *v.* Dunbar, 1 Moll. 442; Field *v.* Boland, 1 Dr. & Wal. 37. See Dowell *v.* Dew, 1 Y. & C. C. C. 345.

[4] Macreth *v.* Symons, 15 Ves. 350; Rice *v.* Rice, 2 Drew. 73.

[5] Plumb *v.* Fluitt, 2 Anst. 432; Hiern *v.* Mill, 13 Ves. 114; Dryden *v.* Frost, 3 M. & C. 670; Leigh *v.* Lloyd, 2 D. J. & S. 330.

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the vendor, and the vendor sells it again to a *bonâ fide* purchaser without notice, he can not recover it. Shaw *v.* Levy, 17 S. & R. 99; Davis *v.* Bigler, 62 Penn. 242; Fleming *v.* Townsend, 6 Geo. 103; Hudnal *v.* Wilder, 4 McCord, 295; Harper *v.* Scott, 12 Geo. 125.

To sustain a voluntary conveyance of personal property against a subsequent purchaser for value, the notice must be actual, and not by record. Fleming *v.* Townsend, 6 Geo. 103; Fowler *v.* Waldrip, 10 Geo. 350; Harper *v.* Scott, 12 Geo. 125.

* Caldwell *v.* Carrington, 9 Pet. 86; Massy *v.* McIlvain, 2 Hill's Ch. 421; Allen *v.* Sanders, 2 Bibb, 94; Yoder *v.* Swope, 3 Bibb, 204; Langdon *v.* Woodfield, 2 B. Mon. 105; Edwards *v.* Morris, 2 A. K. Marsh. 65; Moreland *v.* LeMaster, 4 Blackf. 383.

land which the vendor has covenanted to use in a specified manner is, if he has notice of the covenant, bound by its terms.[1]

It must, however, be observed that the notice required by the doctrine is notice of an equity, which, if clothed with legal completeness, would be indefeasible, and not merely notice of a defeasible legal interest, or of an interest which, if legal, would be defeasible. The principle is, that an interest which, if legal, would be indefeasible shall not be defeated by reason of its equitable character by a party who has notice of it; if, being legal, it may be defeated at law, there is no equity to support it.[2] A voluntary conveyance, for instance, has no equity to support it against a subsequent alienation for value, even though with notice, for the right of the volunteer is defeasible by statute.[3] A feme covert or an infant is just as much bound by notice as an adult.[4]

Notice is either actual or constructive; but there is no difference between them in its consequences.[5] Actual notice consists in express information of a fact, and brings home knowledge directly to a party. Actual notice must, in order to be binding, at least when it depends on oral communication only, proceed from some one interested in the property,[6] and should be in the same transaction. Mere vague rumors, or the assertions of strangers, will not fix a party with actual notice.[7] Actual notice embraces all degrees and grades of

[1] Tulk *v.* Moxhay, 2 Ph. 774; Coles *v.* Sims, 5 D. M. & G. 1; De Mattos *v.* Gibson, 4 D. & J. 282.

[2] Adams' Doct. Equity, 152.

[3] Pulvertoft *v.* Pulvertoft, 18 Ves. 92; Buckle *v.* Mitchell, *ib.* 100.

[4] Jones *v.* Kearney, 1 Dr. & War. 166.

[5] Sheldon *v.* Cox, 2 Eden, 224; Prosser *v.* Rice, 28 Beav. 68; Wormald *v* Maitland, 35 L J. Ch. 69.

[6] Barnhardt *v.* Greenshields, 9 Moo. P. C. C. 18. See Greenslade *v.* Dare, 20 Beav. 284; Jay *v.* Richardson, 30 Beav. 563.

[7] Sug. V. & P. 755. See Greenslade

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* Flagg *v.* Mann, 2 Sumner, 484; Eply *v.* Witherow, 7 Watts, 163; James *v.* Drake, 3 Sneed. 340; Black *v.* Thornton, 31 Geo. 641.

evidence, from the most direct and positive proof to the slightest evidence from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion.[1] *

Whatever is notice enough to excite the attention of a man of ordinary prudence and call for further inquiry is, in equity, notice of all facts to the knowledge of which an inquiry suggested by such notice, and prosecuted with due and reasonable diligence, would have led.[2] † Notice of this sort is called constructive notice. Constructive notice, as distinguished from actual notice, is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute.[3] If a man has actual notice of circumstances sufficient to put a man of ordinary prudence on inquiry as to a particular point, the knowledge which he might, by the exercise of reasonable diligence, have obtained will be imputed to him by a court of

v. Dare, 20 Beav. 284; Central Railway Co. of Venezuela *v.* Kisch, 2 L. R. App. Ca. 112; Hamilton *v.* Royse, 2 Sch. & Lef. 315.

[1] Williamson *v.* Brown, 1 Smith Amer.), 359, *per* Selden, J. See Boursot *v.* Savage, L. R. 2 Eq. 134.

[2] Maitland *v.* Backhouse, 17 L. J. Ch. 121; Espey *v.* Lake, 10 Ha. 260; Mangles *v.* Dixon, 3 H. L. 702; Owen *v.* Homan, 4 H. L. 997; Dawson *v.* Prince, 2 D. & J. 41; Perry *v.* Holl, 2 D. F. & J. 38; Broadbent *v.* Barlow, 3 D. F. & J. 570; Dettmar *v.* Metropolitan and Provincial Bank, 1 H. & M. 641.

[3] Williamson *v.* Brown, 1 Smith (Amer.) 359, *per* Selden, J.; Birdsall *v.* Russell, 2 Tiff. (Amer.) 249.

There is no rule of law which makes a statement of a fact in a newspaper either actual or constructive notice. It is not sufficient to show that a person was in the habit of reading the paper. It must be proved that he read it. Lincoln *v.* Wright, 23 Penn. 76.

* Williamson *v.* Brown, 15 N. Y. 354.

† Galatian *v.* Erwin, 1 Hopk. 48; Roberts *v.* Anderson, 3 Johns. Ch. 371; Pitney *v.* Leonard, 1 Paige, 461; Blaisdell *v.* Stevens, 16 Vt. 173; Stafford *v.* Ballou, 17 Vt. 329; Peters *v.* Goodrich, 3 Ct. 146; Booth *v.* Barnum, 9 Ct. 286; Bingaman *v.* Hyatt, 1 Smed. & Mar. Ch. 437.

equity. The presumption of the existence of knowledge is so strong that it cannot be allowed to be rebutted.[1] *

There is, however, no constructive notice unless it clearly appear that the inquiry suggested by the facts known or discovered would, if fairly pursued, result in the discovery. There must appear to be in the nature of the case such a connection between the fact discovered and the further facts to be discovered that the former may be said to furnish a clue—a reasonable and natural clue—to the latter.[2]

The doctrine of constructive notice applies with peculiar force where the court is satisfied that a man has designedly abstained from inquiry for the very purpose of avoiding knowledge. Wilful ignorance is not to be distinguished, in its equitable consequences, from actual knowledge.[3] If, however,

[1] Plumb *v.* Flintt, 2 Anst. 438, *per* C. B. Eyre; Hewitt *v.* Loosemore, 9 Ha. 455, *per* Turner, L. J.; Espin *v.* Pemberton, 3 D. & J. 554, *per* Lord Chelmsford.

[2] Birdsall *v.* Russell, 2 Tiff. (Amer.) 250.

[3] Jones *v.* Smith, 1 Ha. 55, 1 Ph. 244; Owen *v.* Homan, 4 H. L. 997, 1035.

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* Davis *v.* Bigler, 62 Penn. 242; Harris *v.* Carter, 3 Stew. 233; Hinds *v.* Vattier, 1 McLean, 110; Pearson *v.* Daniel, 2 Dev. & Bat. Eq. 360; Lasselle *v.* Burnett, 1 Blackf. 150; Cotton *v.* Hart, 1 A. K. Marsh. 56.

The principle of the doctrine of constructive notice is, that where a person is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry into the fact is a moral duty and diligence an act of justice. Hence he proceeds at his peril when he omits to inquire, and is then chargeable with a knowledge of all the facts which, by inquiry, he might have ascertained. This neglect is followed by all the consequences of bad faith, and he loses the protection to which his ignorance, had it not proceeded from neglect, would have entitled him. The rule is the same in courts of law or equity, and in both the term notice must receive the same interpretation. It must either be limited to strict knowledge which is derived from positive information, or must be extended to that which the law imputes to him who, having reason to believe or suspect, neglects to inquire. Pringle *v.* Philips, 5 Sandf. 157.

The presumption of notice which arises from proof of that degree of knowledge which will put a party upon inquiry, is not a presumption of

a man abstain from inquiry where inquiry ought to have been made, it is immaterial that the neglect to make inquiry may not have proceeded from any wish to avoid knowledge. It may be that inquiry might not have brought out the truth; but a man who abstains from inquiry where inquiry ought to have been made, cannot he heard to say so and to rely on his ignorance.[1] * In the absence of inquiry, where inquiry ought to have been made, the court is bound to assume that the person from whom inquiry should have been made would have done what it was his duty to do.[2] A man cannot escape being fixed with constructive notice by not using the ordinary caution of employing a solicitor to protect his interest. If a man employs no solicitor he will be held to have exactly the same knowledge, and will be liable to the same extent as if he had employed a solicitor.[3]

If mere want of caution as distinguished from gross and culpable negligence is all that can be imputed to a man, the doctrine of constructive notice will not apply.[4] The doctrine does not go to the extent of fixing a man with such knowledge as he might by the exercise of extreme and extraordinary caution have obtained. A man is in no case bound to use every exertion to obtain information. The want, indeed, of that

[1] Jones *v.* Smith, 1 Ha. 43; West *v.* Reid, 2 Ha. 249; Maitland *v.* Backhouse, 17 L. J. Ch. 121; Jones *v.* Williams, 24 Beav. 47; Mayor of Berwick *v.* Murray, 7 D. M. & G. 497; General Steam Navigaton Co. *v.* Rolt, 6 C. B. N. S. 550. See Farrant *v.* Blanchford, 1 D. J. & S. 107.

[2] Knight *v.* Boyer, 2 D. & J. 450.

[3] Kennedy *v.* Green, 3 M. & K. 699; Harrison *v.* Guest, 6 D. M. & G. 428, 8 H. L. 481.

[4] Jones *v.* Smith, 1 Ha. 55; West *v.* Reid, 2 Ha. 249, 259; Ware *v.* Egmont, 4 D. M. & G. 460; Wilson *v.* Hart, 2 H. & M. 551. See Dodds v. Hills, *ib.* 426.

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law but of fact, and may be rebutted by proof of diligent inquiry. Williamson *v.* Brown, 15 N. Y. 354; Massie *v.* Greenhow, 2 Pat. & Heath, 255; Hoyt *v.* Sheldon, 3 Bosw. 267.

* Oliver *v.* Platt, 3 How. 333; Jenkins *v.* Eldridge, 3 Story, 181; Pitney *v.* Leonard, 181.

caution which a wary and prudent man might, and probably would have adopted, is not such negligence as will affix a party with notice of what he might have ascertained.[1] The means of knowledge by which a man will be affected with notice must be means of knowledge which are practically within reach, and of which a reasonable man or a man of ordinary prudence might have been expected to avail himself.[2] Mere suspicion or vague and indeterminate rumor is not sufficient to put a man upon inquiry.[3] * There must be a reasonable certainty as to time, place, circumstances, or persons.[4] The question is not whether a man had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross and culpable negligence.[5] † Negligence supposes a disregard

[1] Hill *v.* Simpson, 7 Ves. 169; Whitbread *v.* Jordan, 1 Y. & C. 317; Jones *v.* Smith, 1 Ph. 257; West *v.* Reid, 2 Ha. 250; Ware *v.* Egmont, 4 D. M. & G. 460; Stephenson *v.* Royse, 5 Ir. Ch. 401; Re National Life Assurance and Investment Association, 31 L. J. Ch. 828. See Dawson *v.* Prince, 2 D. & J. 41; Greenslade *v* Dare, 20 Beav. 284; Dodds *v.* Hills, 2 H. & M. 424.

[2] Jackson *v.* Rowe, 2 Sim. & St. 472; Broadbent *v.* Barlow, 3 D F. & J. 570.

[3] Whitfield *v.* Fausset, 1 Ves. 392; Hine *v.* Dodd, 2 Atk. 275. See Central Railway Co. of Venezuela *v.* Kisch, 2 L. R. App. Ca. 112.

[4] Story's Eq. Jur. 400; General Steam Navigation Co. *v.* Rolt, 6 C. B. N. S. 550. See Blacklow *v.* Laws, 2 Ha. 48.

[5] Ware *v.* Egmont, 4 D. M. & G. 460; Montefiore *v.* Browne, 7 H. L. 241. See Borell *v.* Dann, 2 Ha. 446; Greenslade *v.* Dare, 20 Beav. 284; Tildesley *v.* Lodge, 3 Sm. & G. 543; Re National Life Assurance and Investment Association, 31 L. J. Ch. 828.

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* Wilson *v.* McCullough, 23 Penn. 440; Lamont *v.* Stimson, 5 Wis. 443; Colquitt *v.* Thomas, 8 Geo. 258.

Circumstances, sufficient to raise suspicion, are constructive notice. Bunting *v.* Ricks, 2 Dev. & Bat. Eq. 130.

A rumor is notice if it turns out to be correct, for it is sufficient to put the party upon inquiry. Benzein *v.* Lenoir, 1 Dev. Eq. 225.

Although the party whose interest would prompt him to misrepresent, asserts that an incumbrance has been paid off or discharged, without furnishing any proof whatever, or referring to any circumstances in support of his assertion, the purchaser who fails to make further inquiry will nevertheless be guilty of such a degree of negligence that he will be considered as having notice. Rice *v.* McDonald, 6 Md. 403.

† Wilson *v.* Wall, 6 Wall. 83; Woodworth *v.* Paige, 5 Ohio St. R. 70; Briggs *v.* Taylor, 28 Vt 180.

of some fact known to a man which at least indicates the existence of that fact, notice of which the court imputes to him.[1] There is often much difficulty in drawing the line between the degree of negligence, which shall be gross negligence, and that mere want of caution which, in the absence of fraud, does not amount to negligence in the legal sense of the term. No general rule can be laid down which shall govern all cases. Each case must depend on its own circumstances.[2] *

It a man has actual notice that the property in question is in fact charged, encumbered, or in some way affected, or has actual notice of facts raising a presumption that it is so, he is bound in equity with constructive notice of all facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice.[3] †

Where, accordingly, a man has notice, whether by recital, description of parties, or otherwise, of an instrument, which from its nature must form, directly or presumptively, a link in the title, or is told at the time that it does so, he will be presumed to have examined it, and therefore to have notice of all

[1] West *v.* Reid, 2 Ha. 249, 259. See Greenslade *v.* Dare, 20 Beav. 284.

[2] Jones *v.* Smith, 1 Ha. 55; West *v.* Reid, 2 Ha. 249; Ware *v.* Egmont, 4 D. M. & G. 460; Colyer *v.* Finch, 5 H. L. 905; Perry-Herrick *v.* Attwood, 2 D. & J. 21. See as to negligence, *supra*, pp. 140, 141.

[3] 1 Ha. 55, *per* Wigram, V.-C.; 7 H. L. 262, *per* Lord Chelmsford. See Downes *v.* Power, 2 Ba. & Be. 493; Grant *v.* Campbell, 6 Dow, 239; Neesom *v.* Clarkson, 2 Ha. 163; West. *v.* Reid, *ib.* 249; Att.-Gen. *v.* Flint, 4 Ha. 147; Frail *v.* Ellis, 16 Beav. 350; *Re* Bright's Trusts, 21 Beav. 430; Coles *v.* Sims, 5 D. M. & G. 1; Welchman *v.* Coventry Union Bank, 8 W. R. 729; Jay *v.* Richardson, 30 Beav. 563; Cox *v.* Coventon, 31 Beav. 388; Locke *v.* Prescott, 32 Beav. 261; Leigh *v.* Lloyd, 2 D, J. & S. 330.

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* Lowry *v.* Brown, 1 Cold. 456; Doyle *v.* Teas, 4 Scam. 202.

† Skeel *v.* Spraker, 8 Paige, 182; Roberts *v.* Stanton, 2 Munf. 129; Rowan *v.* Adams, 1 Smed. & Mar. Ch. 45; Poulet *v.* Johnson, 25 Geo. 403; Mayfield *v.* Averitt, 11 Tex. 140; Currens *v.* Hart, Hardin, 37.

A defective deed is notice of all fraud connected with its execution Smith *v.* Shane, 1 McLean, 22.

instruments or facts to which an examination would have led him.[1]

A purchaser, accordingly, who has actual notice of a deed, is bound by all its contents,[2] * and has notice of all equities springing out of the deed,[3] † and of all instruments to which an examination of the deed would have led him;[4] ‡ even although such instruments are not actually recited, but there is only a recital that the property is subject to limitations which, in fact, correspond with the limitations thereby created.[5] If the deed under which he takes title be a settlement, he takes with notice of all equities springing out of the settle-

[1] Surman *v.* Barlow, 2 Eden, 167; Sheldon *v.* Cox, *ib.* 224; Hamilton *v.* Royse, 2 Sch. & Lef. 326; Taylor *v.* Baker, 5 Pri. 306; Jones *v.* Smith, 1 Ph. 253; West *v.* Reid, 2 Ha. 249. See Moor *v.* Bennett, 2 Ch. Ca. 246; Bath and Montague's Case, 3 Ch. Ca. 110; Mertins *v.* Jolliffe, Amb. 311; Plumb *v.* Flintt, 2 Anst. 432; Palmer *v.* Wheeler, 2 Ba. & Be. 31; Fyre *v.* Dolphin, *ib.* 290; Malpas *v.* Ackland, 3 Russ. 273; Davis *v.* Thomas, 2 Y. & C. 234; Roddy *v.* Williams, 3 J. & L. 1; Steadman *v.* Poole, 16 L. J. Ch. 349; Hope *v.* Liddell, 21 Beav. 183; Cox *v.* Coventon, 31 Beav. 378; Clements *v.* Welles, L. R. 1 Eq. 200.

[2] Tanner *v.* Florence, 1 Ch. Ca. 259; Taylor *v.* Stibbert, 2 Ves. Jr. 437; Neesom *v.* Clarkson, 2 Ha. 173.

[3] Hamilton *v.* Royse, 2 Sch. & Lef. 326; but see Ll. & G. 264, *per* Lord St. Leonards, Sug. V. & P. 777.

[4] Coppin *v.* Fernyhough, 2 Bro. C. C. 291; Bisco *v.* Earl of Banbury, 1 Ch. Ca. 287, 291; Tanner *v.* Florence, *ib.* 259, 260; Davies *v.* Thomas, 2 Y. & C. 234.

[5] Neesom *v.* Clarkson, 2 Ha. 163.

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* Wormley *v.* Wormley, 8 Wheat. 421; Johnston *v.* Gwathmey, 4 Litt. 317; Chew *v.* Calvert, Walker, 54; Oliver *v.* Piatt, 3 How. 333; Neale *v.* Haythrop, 3 Bland, 551; Christmas *v.* Mitchell, 3 Ired. Eq. 535; Mason *v.* Paine, Walker's Ch. 453.

† Hackwith *v.* Dawson, 1 Minn. 235; Rutter *v.* Barr, 4 Ohio, 446; Van Dorn *v.* Robinson, 1 Green, 256; Gordon *v.* Sizer, 39 Miss. 805; Griffith *v.* Griffith, 1 Hoff. Ch. 153; Rogers *v.* Jones, 8 N. H. 264.

‡ Chew *v.* Caloitt, 1 Walk. 54; Neale *v.* Haythrop, 3 Bland, 551; Kerr *v.* Kitchen, 17 Penn. 433; Johnson *v.* Thweatt, 18 Ala. 741; Wailes *v.* Cooper, 24 Miss. 208; McRimmers *v.* Martin, 14 Tex. 318.

A purchaser is bound to take notice of qualifications in the power of attorney of an agent from whom he purchases. Morris *v.* Terrell, 2 Rand. 6; Graves *v.* Graves, 1 A. K. Marsh. 165.

The doctrine of constructive notice has no reference to controversies between vendor and vendee in relation to their own rights. Champlin *v.* Laytin, 6 Paige, 189.

ment.[1] Notice of a postnuptial, and apparently voluntary, settlement agreement, is notice of the antenuptial settlement on which it is founded.[2] So also notice of an equitable claim, as affecting an unspecified portion of the property, is notice of the claim as in fact affecting the entirety.[3] If the deed under which he takes title shows that there are incumbrances affecting the property to which the deed relates, he takes with notice of all such incumbrances.[4] In Peto *v.* Hammond,[5] the purchaser of land from the allottees of a building society, who had not inquired for the conveyance of the land to the trustees of the society, was held bound not only by the notice of the deed, but also by what would have certainly been told him, if he had inquired for the deed, namely, that the deed had been retained by the party who had sold the land to the trustees, as an equitable mortgage, with a covenant from the trustees to convey the legal estate to him, if required. So also if a man purchases from a seller whose conveyance was "subject to all the mortgages and charges affecting the same," he will be bound by a prior deposit of the deeds relating to a portion of the estate of which he had not notice, although there were other charges of which he was informed, which satisfied the words, "mortgages and charges."[6] A prospectus, however, of a company, mentioning an act of Parliament, in which act a deed of settlement is recited, is not of itself sufficient to fix any person reading the prospectus with constructive notice of the contents of the deed. To hold that he was would be carrying the doctrine of constructive notice too far.[7]

So also notice of a lease is notice of all its contents.[8] If a purchaser has notice that property is held under a lease, he

[1] Hamilton *v.* Royse, 2 Sch. & Lef. 326.
[2] Ferrars *v.* Cherry, 2 Vern. 384.
[3] Att.-Gen. *v.* Flint, 4 Ha. 147.
[4] Montefiore *v.* Browne, 7 H. L. 241; but see Sug. V. & P. 777.
[5] 30 Beav. 495.
[6] Jones *v.* Williams, 24 Beav. 47.
[7] *Re* National Assurance Association, 10 W. R. 518.
[8] Hall *v.* Smith, 14 Ves. 426; Walter *v.* Maunde, 1 J. & W. 181; Smith *v.*

cannot object that he had no notice of any particular covenant therein contained.[1] The omission on the part of the vendor to state unusual covenants in the particulars of sale, does not affect the title;[2] nor is it a misrepresentation, although the value of the premises may be lessened by such covenants.[3] In a case where the conditions of sale were silent as to the nature of the covenants, and required that the purchaser should covenant with the vendor for the performance of the covenants and conditions in the lease, a covenant in the lease against carrying on certain specified trades, "or any other noisome or offensive trade," was held to be no objection to the title.[4] So also a clause against alienation without the lessor's consent was held to be no objection in the lease of a house, at least in or near London.[5]

A man who wishes to protect himself against unusual or particular covenants, should, before purchasing, inquire into the covenants and stipulations of the original lease, so as to know precisely the terms on which the property is held.[6] If there be no misrepresentation by the vendor, the purchaser is bound by the contents of the lease;[7] but if there be misrepresentation, so that the acuteness and industry of the purchaser is set to sleep, and he is induced to believe the contrary of what is the real state of the case, the vendor is in such case bound by the misrepresentation.[8] If, for instance, the terms of a particular covenant turn out to be of a much more stringent description than they were represented to be, there is fraud.[9]

Capron, 7 Ha. 191; Dawes *v.* Betts, 12 Jur. 709; Lewis *v.* Bond, 18 Beav. 85; Parker *v.* Whyte, 1 H. & M. 167; Clements *v.* Welles, L. R. 1 Eq. 200; but see Martin *v.* Cotter, 3 J. & L. 506, *per* Lord St. Leonards.

[1] *Ib.*

[2] Pope *v.* Garland, 4 Y. & C. 394.

[3] Spunner *v.* Walsh, 10 Ir. Eq. 386, 11 Ir. Eq. 598.

[4] Grosvenor *v.* Green, 28 L. J. Ch. 173.

[5] Strangways *v.* Bishop, 29 L. T. 120.

[6] Pope *v.* Garland, 4 Y. & C. 394; Martin *v.* Cotter, 3 J. & L. 506; Cullen *v.* O'Meara, L. R. Ir. 2 C. L. 663.

[7] Pope *v.* Garland, 4 Y. & C. 394; Spunner *v.* Walsh, 10 Ir. Eq. 400.

[8] Pope *v.* Garland, 4 Y. & C. 394.

[9] Flight *v.* Booth, 1 Bing. N. C. 377;

The rule that notice of a lease is notice of its contents applies to the case of sales under a decree, as well as to the case of sales out of court.[1]

Though notice of a lease is notice of its contents, the court may, on the application for specific performance, decline to grant specific performance of a lease containing covenants of an unusual nature, if the person against whom the relief is sought had no reasonable means of inspecting the original lease, or knowing its contents.[2] If, however, he has had reasonable means of inspecting the lease, specific performance will be decreed,[3] although he may have intended to apply the property to a purpose which, as it turned out, was prohibited.[4] It is immaterial, in such case, whether or not the vendor knew the purchaser's intention.[5]

So, also, and upon the same principle, where a man is of right in possession of corporeal hereditaments, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held;[6]* nor is it necessary that such possession should be

Van *v.* Corpe, 3 M. & K. 269, *supra*, p. 92.

[1] Spunner *v.* Walsh, 10 Ir. Eq. 386.

[2] Hanbury *v.* Litchfield, 2 M. & K. 629; Flight *v.* Barton, 3 M. & K. 282; Nelthorpe *v.* Holgate, 1 Coll. 203; Martin *v.* Cotter, 3 J. & L. 507; Williams *v.* Livesey, 18 Beav. 206; Brumfit *v.* Morton, 3 Jur. N. S. 1198; Darlington *v.* Hamilton, Kay, 550.

[3] Smith *v.* Capron, 7 Ha. 191.

[4] Morley *v.* Clavering, 29 Beav. 84.

[5] *Ib.*

[6] Taylor *v.* Stibbert, 2 Ves. Jr. 437; Crofton *v.* Ormsby, 2 Sch. & Lef. 583; Powell *v.* Dillon, 2 Ba. & Be. 416; Greenwood *v.* Bairstow, 5 L. J. Ch. N. S. 179; Jones *v.* Smith, 1 Ha. 60; Bailey *v.* Richardson, 9 Ha. 734; Att.-Gen. *v.* Stephens, 1 K. & J. 750; Holmes *v.* Powell, 8 D. M. & G. 580.

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* Harris *v.* Carter, 3 Stew. 233; Buckingham *v.* Smith, 10 Ohio, 288; Patten *v.* Hollidaysburg, 40 Penn. 206; Hardy *v.* Summers, 10 G. & J. 316; Hanly *v.* Morse, 32 Me. 287; Hughes *v.* United States, 4 Wall. 232; Moreland *v.* Lemaster, 4 Blackf. 383; Landis *v.* Brant, 10 How. 375; Lea *v.* Polk County Copper Co., 21 How. 499; Griswold *v.* Smith, 10 Vt. 452; Morgan *v.* Morgan, 3 Stew. 383; Walker *v.* Gilbert, 1 Freem. Ch. 85; Jenkins *v.* Bodley, 1 Smed. & Mar. Ch. 338; Witter *v.* Hightower, 6 Smed.

continually visible, or actively asserted. If a man has once received rightful possession of land, he may go to any distance from it without authorizing any servant, or agent, or other person, to enter upon it, or look after it, may leave it for years uncultivated and unused, may set no mark of ownership upon it, and his possession may nevertheless continue, at least unless his conduct afford evidence of intentional abandonment. A man who knows, or cannot be heard to deny that he knows, another to be in possession of a certain property, cannot for any civil purpose, as against him at least, be heard to deny having thereby notice of the title, or alleged title, under which, or in respect of which, the former is or claims to be in that possession.[1] Where, accordingly, the purchaser of mines took possession under the agreement for purchase, without any conveyance, it was held that a subsequent purchaser of land, without any exception of mines, took with notice of the agreement.[2]

[1] Holmes *v.* Powell, 8 D. M. & G. 580. [2] Holmes *v.* Powell, 8 D. M. & G. 580.

& Mar. 345; Smith *v.* Shane, 1 McLean, 22; Grimstone *v.* Carter, 3 Paige, 421; Diehl *v.* Page, 2 Green's Ch. 143; Baldwin *v.* Johnson, Saxton, 441; Knox *v.* Thompson, 1 Litt. 350; Brown *v.* Anderson, 1 Mon. 193; Johnston *v.* Glancey, 4 Blackf. 94.

In this country, where the registration of deeds as matters of title is universally provided for, courts of equity will not enlarge the doctrine of constructive notice, nor follow English cases, except with cautious attention to their application to the circumstances of our country, and to the structure of our laws. Flagg *v.* Mann, 2 Sumner, 486.

Possession is not evidence of notice, unless that possession was known to the purchaser, nor can it be conclusive if it be known; and, therefore, is not equivalent to recording. It is at most implied notice, which may be rebutted. Harris *v.* Arnold, 1 R. I. 126; Vaughan *v.* Tracey, 22 Mo. 415; Hewes *v.* Wiswall, 8 Greenl. 94; Emmons *v.* Murray, 16 N. H. 385.

The notice is merely an inference. It may not arise in some cases; it may be repelled in others; and in others it may be restricted to some particular title. The rule, like all rules of circumstantial evidence, must be governed by the particular circumstances of each case, and have a

If there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and the equity of the tenant extends not only to interests connected with his tenancy, as in Taylor *v.* Stibbert,[1] but also to interests under collateral agreements,[2] the principle being the same in both cases, namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound either to inquire what the interest is, or to give effect to it whatever it may be.[3]* If the tenant has even changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title as purchaser.[4]

[1] 2 Ves. Jr. 437.

[2] Daniels *v.* Davison, 16 Ves. 249; 17 Ves. 433; Allen *v.* Anthony, 1 Mer. 282.

[3] Barnhardt *v.* Greenshields, 9 Moo. P. C. 32; Knight *v.* Bowyer, 2 D. & J. 450.

[4] Daniels *v.* Davison, 16 Ves. 249; 17 Ves. 433; Crofton *v.* Ormsby, 2 Sch. & Lef. 583; Powell *v.* Dillon, 2 Ba. & Be. 416; Wilbraham *v.* Livesey, 18 Beav. 206.

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reasonable operation. Cook *v.* Travis, 22 Barb. 338; Faust *v.* Smith, 23 N. Y. 252.

Possession under a recorded deed is not notice of rights under an unrecorded deed. Great Falls Co. *v.* Worster, 15 N. H. 412.

There is no efficacy in a possession which terminated before the negotiation that led to the purchase commenced. Wright *v.* Wood, 23 Penn. 120.

Joint possession by a vendor and vendee is no notice of an unrecorded deed. Smith *v.* Yule, 31 Cal. 180.

Possession by a mortgagor after foreclosure is not notice of any secret trust in his favor. Surmberger *v* Webster, 1 Clark, 188.

Possession is notice to judgment creditors of the vendor. Massey *v.* McIlwain, 2 Hill's Ch. 421; Macon *v.* Sheppard, 2 Humph. 335; Hackwith *v.* Damson, 1 Mon. 235.

* Disbrow *v.* Jones, Harring's Ch. 48; McMechen *v.* Griffing, 3 Pick. 149. Possession by a tenant is not notice of the landlord's title. Smith *v.* Dall, 13 Cal. 510.

The possession of a *cestui que trust* is not constructive notice of the legal title of the trustee. Scott *v.* Gallagher, 14 S. & R. 333.

The possession of an intruder is not notice of the title of a stranger. Wright *v.* Wood, 23 Penn. 120.

The principle that possession by a tenant of land is notice of the terms of his holding applies to a case where a man buys property subject to an easement. He is bound by all the equities which bound his vendors.[1] So also when the mortgagee of a burial ground had notice of the purposes to which it was devoted, he was held bound by the right of burial, temporary or in perpetuity, granted by his mortgagor when left in possession.[2]

Notice, however, of a past tenancy is not notice of the tenants' equitable interests,[3] nor when the vendor is himself the tenant, and has acknowledged payment of the purchase money both in the body of the conveyance and by the usual endorsed receipt, is the tenancy notice of his lien for any part thereof which may in fact remain unpaid.[4] Nor is notice of a tenancy necessarily notice of the tenant's equities as between vendor and purchaser.[5] Nor is notice of a tenancy constructive notice of the lessor's title.[6] Nor will a *bonâ fide* purchaser, otherwise without notice, be affected by the mere circumstance of the vendor having been out of possession for many years. A purchaser neglecting to inquire into the title of the occupier is not affected by any other equities than those which such occupier may insist on. If a person equitably entitled to an estate lets it to a tenant who takes possession, and then the person having the legal estate sells to a person who purchases *bonâ fide* and without notice of the equitable claim, the purchaser will hold against the equitable owner, although he had notice of the tenant being in possession.[7] In all the cases the possession relied on has been the actual occupation of the land, and the equity sought to be enforced has been on behalf of the

[1] Hervey *v.* Smith, 1 K. & J. 389; 22 Beav. 499.

[2] Moreland *v.* Richardson, 22 Beav. 596.

[3] Miles *v.* Langley, 1 R. & M. 39; 2 R. & M. 626.

[4] White *v.* Wakefield, 7 Sim. 401.

[5] Nelthorpe *v.* Holgate, 1 Coll. 203.

[6] Jones *v.* Smith, 1 Ha. 63, *per* Wigram, V.-C.; Barnhardt *v.* Greenshields, 9 Moo. P. C. 34.

[7] Oxwith *v.* Plummer, 2 Vern. 636; Barnhardt *v.* Greenshields, 9 Moo. P. C. 34.

party so in possession.[1]* But it must be remembered that by *the party in occupation* is meant, not merely the person who by himself and his laborers tills the ground, but the person who is known to receive the rents from the person in occupation.[2] So also notice of the legal estate being outstanding is notice of the trusts on which it is held;[3] and notice that the title deeds are in the possession of a third party, is notice of any charge he has upon the property.[4]

So also, and upon the same principle, a person has been held to be affected with notice of a fraud affecting a deed, and which the unusual manner in which it was executed ought to have suggested to his solicitor.[5] So also, if a bill be accepted in blank, and the acceptor was aware of the fact, there is notice of any fraudulent use that may have been made of it.[6] So also a lessee,[7] or a sub-lessee, has notice of the title of the im-

[1] Barnhardt *v.* Greenshields, 9 Moo. P. C. 34.
[2] Knight *v.* Bowyer, 23 Beav. 609, 640, 641, 2 D. & J. 421.
[3] Anon. 2 Freem. 137.
[4] Hiern *v.* Mill, 13 Ves. 122; Dryden *v.* Frost, 3 M. & C. 670.
[5] Kennedy *v.* Green, 3 M. & K. 699. See Greenslade *v.* Dare, 20 Beav. 291; Greenfield *v.* Edwards, 2 D. J. & G. 582; Sug. V. & P. 776.
[6] Hatch *v.* Searles, 24 L. J. Ch. 22. See Sharp *v.* Arbuthnot, 13 Jur. 219.
[7] Att.-Gen. *v.* Backhouse, 17 Ves. 293; Butler *v.* Lord Portarlington, 1 Dr. & War. 20; Att.-Gen. *v.* Hall, 16 Beav. 388.

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* Kendall *v.* Lawrence, 22 Pick. 540; Holmes *v.* Stout, 2 Stockt. 419; Coleman *v.* Barklew, 3 Dutch. 357; Truesdale *v.* Ford, 37 Ill 210; Ely *v.* Wilcox, 20 Wis. 523; Blankenskip *v.* Douglass, 26 Tex. 225; Patten *v.* Moore, 32 N. H. 382.

The holder of an unrecorded deed must show a *possessio pedis*, an actual *bonâ fide* possession consistent with his written title; and this possession must be evidenced by an actual inclosure, or something equivalent, as showing the extent and the fact of his dominion and control of the premises. Havens *v* Dale, 18 Cal. 359.

The possession must be such an occupancy of the land as will put any person upon inquiry, and indicate the party of whom inquiry is to be made. Green *v.* Drinker, 7 W. & S. 440; Rogers *v.* Jones, 8 N. H. 264; Williams *v.* Sprigg, 6 Ohio St. R. 585.

Possession is not notice, when the purchaser also knows that the possessor has been in possession for some time without claiming title. Matthews *v.* Demerritt, 9 Shep. 312.

mediate and (in the case of a sub-lessee) original lessee.[1] So where a family solicitor, who had prepared a marriage settlement, became the apparent purchaser of the estate under a fictitious exercise of the usual power of sale, and subsequently executed instruments purporting to vest the estate in the husband, and then, as the husband's solicitor, applied for a loan on mortgage, and delivered an abstract of the title as above referred to in the usual way, with his name as solicitor, it was held that the purchaser had implied notice of his having been the solicitor who prepared the settlement, and of the irregularity of the nominal purchase.[2] So, a mortgagee having notice that a bill which formed part of the consideration for the purchase of the estate by the mortgagor, remained unpaid, has been held bound to inquire whether the vendor has any lien on the estate, the deed of conveyance leaving the point doubtful.[3] So, a purchaser dealing with trustees for sale at a time or under circumstances suggestive of the probability of the sale being a breach of trust, is bound to inquire and see whether any such breach of trust is in fact being committed.[4] So also notice of a deed is not only notice of its contents, but of the facts to a knowledge of which the insisting on its production would have necessarily led.[5] So also a man who buys property from an agent, with distinct notice that the party with whom he is dealing is an agent, has cast upon him the liability of sustaining the transaction just as much as the agent himself. If the transaction could not be upheld by the agent, neither could it be supported by a purchaser from that agent, if he deals with him in his character of agent.[6]

When, however, a sale by fiduciary vendors is apparently regular, a purchaser need not inquire into collateral questions,

[1] Steedman *v.* Poole, 6 Ha. 193. See Cosser *v.* Collinge, 3 M. & K. 283.
[2] Robinson *v.* Briggs, 1 Sm. & G. 188.
[3] Frail *v.* Ellis, 16 Beav. 350.
[4] Stroughill *a.* Anstey, 1 D. M. & G. 635.
[5] Peto *v.* Hammond, 30 Beav. 495.
[6] Molony *v.* Kernan, 2 Dr. & War. 40

such as the mode in which the sale has been conducted,[1] although he will be affected with notice of a breach of trust clearly deducible from facts appearing in the assurance.[2] Nor, although a purchaser of a lease is bound to know from whom the lessor derived his title, is he affected with notice of all the circumstances under which he so derived it.[3] Nor, *semble*, is notice of a lease notice of collateral facts mentioned in the lease.[4] Nor, on the purchase of A, one of two adjoining estates belonging to the same owner, is notice of building covenants entered into by such owner with a mortgagee of the adjoining estate B, notice of the expenditure on both estates of money which, under the covenant, ought to have been expended on B exclusively.[5]

The possession of a client's deeds by a solicitor is so usual, and so much in the ordinary course of transactions, that where a man purchases an estate, and is informed that the deeds are in the hands of the solicitor of the owner of the estate, there is nothing which renders it necessary for him to inquire under what circumstances the solicitor held the deeds.[6] When a solicitor acquires by contract a different interest beyond what his character of solicitor confers (such as equitable mortgagee), it is incumbent on him immediately to give clear and distinct notice of such interest to all persons in visible ownership of the estate. Such a case is not within the principle of the cases in which a purchaser of land has been held bound to inquire of the tenant in possession the nature of his interest.[7]

The omission of a purchaser of property to inquire after the title deeds is gross negligence, and will affect him with the knowledge which he might have obtained upon inquiry.

[1] See Borell *v.* Dann, 2 Ha. 440, 450. See Ware *v.* Egmont, 4 D. M. & G. 460.

[2] See Att.-Gen. *v.* Pargeter, 6 Beav. 150; Ker *v.* Lord Dungannon, 1 Dr. & War. 509, 542.

[3] Att.-Gen. *v.* Blackhouse, 7 Ves. 293.

[4] See Darlington *v.* Hamilton, Kay, 556.

[5] Harryman *v.* Collins, 18 Beav. 19.

[6] Bozon *v.* Williams, 3 Y. & J. 150.

[7] *Ib.*

The possession of the legal estate will not protect a man who has omitted to inquire after the title deeds, or who accepts a frivolous excuse for their non-production against the claim of an innocent party.[1] So also, a man taking from a vendor who has not possession of the deeds, will take with notice of any claim which the party in possession of the title deeds has.[2] The omission, however, of a purchaser to inquire for the deeds will not affect him with knowledge of fraud committed by the person of whom he was bound to make inquiry.[3]

Though notice of a deed is notice of its contents, the mere fact that a man has been witness to the execution of a deed will not of itself fix him with notice of the contents.[4] Nor is notice of a will passing all the testator's real estates generally, and not specifically, notice of all the particular estates which the testator had to pass.[5] Nor if a purchaser has notice only that a draft of the deed is prepared, and not that the deed was executed, would he be bound by notice, although the deed was actually executed; for a purchaser is not to be affected by notice of a deed in contemplation.[6]

A mere statement that further information is to be had at the office of a company, is not enough to put persons upon inquiry whether statements put forward by directors are true or false.[7] But if a man, on being specially referred to another for information, neglects to apply to him, he will be held to

[1] Worthington *v.* Morgan, 16 Sim. 547; Tylee *v.* Webb, 6 Beav. 552; Allen *v.* Knight, 5 Ha. 272; 11 Jur. 527; Hewett *v.* Loosemore, 9 Ha. 449; Colyer *v.* Finch, 5 H. L. 905; Tildesley *v.* Lodge, 3 Sm. & G. 543; Perry-Herrick *v.* Attwood, 2 D. & J. 21; Atterbury *v.* Wallis, 8 D. M. & G. 454; Peto *v.* Hammond, 30 Beav. 495; Wormald *v.* Maitland, 35 L. J. Ch. 69; Hopgood *v.* Ernest, 3 D. J. & S. 116, *supra*, pp. 140, 141.

[2] Dryden *v.* Frost, 3 M. & C. 670. See Hiern *v.* Mill, 13 Ves. 122. Comp. Bozon *v.* Williams, 3 Y. and J. 150, *supra*, pp. 140, 141.

[3] Hipkins *v.* Amery, 2 Giff. 292.

[4] Mocatta *v.* Murgatroyd, 1 P. Wms. 393; Beckett *v.* Cordley, 1 Bro. C. C. 357; Rancliffe *v.* Parkins, 6 Dow, 149, 222; Sug. V. & P. 751.

[5] Rancliffe *v.* Parkins, 6 Dow, 149, 222–224.

[6] Cothay *v.* Sydenham, 2 Bro. C. C. 391. See Jones *v.* Smith, 1 Ha. 63; 1 Ph. 256.

[7] Smith *v.* Reese River Co., L. R. 2 Eq. 269.

have notice of what he might have learnt upon inquiry.[1] So also if a man, having reasonable grounds to suspect the existence of a fact of importance, asks one of the parties to the transaction, who refuses all information, but does not ask other parties, whom he has reason to believe to be able and willing to give him information, his ignorance is willful.[2] A party relying on his ignorance of fact must show not only that he had not the information, but that he could not with diligence have obtained it.[3]

A man who in dealing for property is told of anything as affecting the property, though incorrectly, can not rely on what is told him, but is bound to make further inquiry, and to ascertain the exact truth.[4] If a man knows that another has or claims an interest in property, he, in dealing for that property, is bound to inquire what that interest is, although it may be inaccurately described.[5] If a man be told or has notice that a certain instrument affects the property in question in some particular respect, he will be fixed with notice of its provisions if it should turn out to affect the property in other respects also.[6] Notice of a charge to an indefinite amount, although the notice be inaccurate as to the particulars, or the extent of the charge, is sufficient to put upon inquiry a party dealing for the property subject to the charge, and if the actual charge appear afterwards to be incorrectly described in the notice, it is nevertheless sufficient as a ground for giving priority for the true amount of the charge as against the party who received the incorrect notice, but made no inquiry.[7]

In Taylor *v.* Baker,[8] a party, at the time of making his

[1] Wason *v.* Waring, 15 Beav. 151.
[2] Bainbrigge *v.* Moss, 3 Jur. N. S. 58.
[3] Wason *v.* Waring, 15 Beav. 151.
[4] Wilson *v.* Hart, 2 H. & M. 551; L. R. 1 Ch. App. 463. See Jones *v.* Smith, 1 Ph. 255. Comp. *re* Bright's Trust, 21 Beav. 430.
[5] Gibson *v.* Ingo, 6 Ha. 112, 124. See Att.-Gen. *v.* Jones, 2 Jur. 369.
[6] Taylor *v.* Baker, 5 Pri. 306; Jackson *v.* Rowe, 2 Sim. & St. 475; Farrow *v.* Rees, 4 Beav. 18; Mitchell *v.* Steward, 35 L. J. Ch. 393. See Jones *v.* Smith, 1 Ph. 255.
[7] Gibson *v.* Ingo, 6 Ha. 124.
[8] 5 Pri. 306.

purchase, and before it was made, had actual notice that a certain person had a judgment and warrant of attorney which affected the purchased estate. It turned out, however, that he had a mortgage and not a judgment, and the court held that the purchaser, having notice that he had an interest affecting the property, could not ward off the claim to the incumbrance, only because the nature of the claim was different from that which the notice conveyed to him.[1] The principle was carried further in Penny *v.* Watts.[2] A man there, who claimed under a marriage settlement as a purchaser without notice, had notice before his marriage that a legatee had given up her legacy under a will in favor of the intended wife, to whom the estate upon which it was charged belonged, and which was comprised in the subsequent marriage settlement; and had also notice that the intended wife had in consequence devised to the legatee a portion of the estate, and that the legatee was dead. This was held by Lord Cottenham to be notice as leading to inquiry of an equitable reversionary title in the husband of the legatee under a subsequent agreement with the lady, the devisor, before her marriage, to convey the devised estate to him. It has, however, been considered by Lord St. Leonards,[3] and in Abbott *v.* Gerahty,[4] that this case carries the principle too far.

Though a man, who has actual notice that the property in respect of which he is dealing, is in fact affected by a particular instrument, is bound to examine that instrument, he is not bound to examine instruments which are not directly or presumptively connected with the title to the property in question, merely because he knows that they exist, and may by possibility affect it. If an instrument does not necessarily

[1] See Steadman *v.* Poole, 16 L. J. Ch. 349; 6 Ha. 193.
[2] 1 Mac. & G. 150.
[3] Sug. V. & P. 766.
[4] 4 Ir. Ch. 23.

affect the title, but only may or may not do so according to circumstances, the omission to examine it will not fix a party with gross negligence, if there is no reason to suppose that he may have acted otherwise than fairly in the transaction.[1] Nor is notice that certain circumstances exist which may by possibility affect the property in dispute sufficient to put a man upon inquiry, if he appear to have acted fairly in the transaction.[2] A purchaser, for instance, will not be affected by an ambiguous recital,[3] or by circumstances inducing merely a suspicion of fraud,[4] or by the usual trust of a term to attend the inheritance, where no reference is made to any particular instrument or course of limitations;[5] so notice of there being a change of solicitors who are professionally to represent a particular interest, is not, in itself, notice of a change in the ownership of such interest;[6] nor is the mere fact of a daughter, soon after coming of age, giving securities to a creditor of her father in payment of his debt, of itself a ground for imputing to the creditor knowledge of undue influence having been exerted over her by her father.[7] To affect the creditor with notice of undue influence, it is not enough to show that he was aware of the reluctance of the daughter to concur in the security.[8]

In Hervey *v.* Smith,[9] the purchaser of a house to which a

[1] Kenney *v.* Browne, 3 Ridg. P. C. 512; Jones *v.* Smith, 1 Ha. 43, 1 Ph. 254; West *v.* Reid, 2 Ha. 249; Ware *v.* Egmont, 4 D. M. & G. 460; Harryman *v.* Collins, 18 Beav. 11; Greenslade *v.* Dare, 20 Beav. 284; *Re* Bright's Trust, 21 Beav. 430; Stephenson *v.* Royse, 5 Ir. Ch. 401; Cox *v.* Coventon, 31 Beav. 378; General Steam Navigation Co. *v.* Rolt, 6 C. B. N. S. 550; Perry *v.* Holl. 2 D. F. & J. 38. See *Re* National Life Assurance and Investment Co, 31 L. J. Ch. 828.

[2] *Ib.*

[3] Kenney *v.* Browne, 3 Ridg. P. C. 512. See 2 Ha. 175.

[4] M'Queen *v.* Farquhar, 11 Ves. 482. See Dodds *v.* Hills, 2 H. & M. 426.

[5] Dart, V. & P. 566.

[6] West *v.* Reid, 2 Ha. 249.

[7] Thornber *v.* Sheard, 12 Beav. 589. See Cobbett *v.* Brock, 20 Beav. 524. Comp. Espey *v.* Lake, 10 Ha. 260; Sercombe *v.* Saunders, 34 Beav. 382; Berdoe *v.* Dawson, *ib.* 603. See *supra*, p. 180.

[8] Rhodes *v.* Cook, 4 L. J. Ch. 149, 2 Sim. & St. 488. See Blackie *v.* Clark, 15 Beav. 595. Comp. Maitland *v.* Irving, 15 Sim. 441.

[9] 22 Beav. 299.

wall having fourteen flues or chimneys in it belonged, twelve only, however, of which were used by the house, was held bound by this fact to know that the other two must have been used by his neighbor. But the doctrine of constructive notice was carried too far in that case.[1]

Nor is a man bound to examine a deed or document, which does not necessarily from its very nature affect the property in question, if he be told that it does not affect it, and he acts fairly in the transaction, and believes the representation to be true.[2] The effect, indeed, of what would otherwise be notice, may be destroyed by misrepresentation. A man to whom a particular and distinct representation is made is entitled to rely on the representation, and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn, and which, independently of the representation, would have been sufficient to put him upon inquiry,[3] or, although he is told that further information may be had on the matter by making inquiries from a particular person, or at a particular place.[4] A man is entitled to rely on the representations of the vendor as to the contents of a deed, and is not bound to examine the deed itself.[5] So, also, a man who purchases shares in a company on the faith of a prospectus, may rely on the statements made therein, and is not bound to ascertain whether they are true.[6] The mere fact that he may have attended a meeting of the company is not a sufficient

[1] Sug. V. & P. 765.

[2] Jones *v.* Smith, 1 Ha. 43, 1 Ph. 251; *Re* Bright's Trust, 21 Beav. 430.

[3] Van *v.* Corpe, 3 M. & K. 269; Flight *v.* Barton, *ib.* 282; Pope *v.* Garland, 4 Y. & C. 394; Wilson *v.* Short, 6 Ha. 366, 367; Vignolles *v.* Bowen, 12 Ir Eq. 385; Cox *v.* Middleton, 2 Drew. 209, *supra*, pp. 80, 81.

[4] Smith *v.* Reese River Silver Mining Co., L. R. 2 Eq. 264.

[5] Grosvenor *v.* Green, 28 L. J. Ch 173; M'Culloch *v.* Gregory, 1 K. & J 286; *Re* Bright's Trust, 21 Beav. 430, Cox *v.* Coventon, 31 Beav. 378; *Ex parte* Briggs, L. R. 1 Eq. 483. See Martin *v.* Cotter, 3 J. & L. 505.

[6] Smith *v.* Reese River Silver Mining Co., L. R. 2 Eq. 264; Stewart's Case, L. R. 1 Ch. App. 574.

ground for fixing him with notice of the falsity of the representations in the prospectus.[1] Nor will a shareholder in a company be affected with knowledge of the documents referred to in the memorandum, or articles of association of a company, as to be debarred from complaining of any false or deceptive statements which may have been made as to the contents of those documents.[2]

If a *bonâ fide* inquiry be made in the proper quarter, and a reasonable answer be given, a man may rest satisfied with the information, and need not make any further inquiry.[3] A man, for instance, who, on the purchase of property *bonâ fide*, inquires for the title deeds, is not bound to make further inquiry, if a reasonable excuse is made for their not forthcoming.[4] So, also, if deeds are deposited with a man by the other party to the transaction, which purport, or are represented to be all the material deeds relating to the estate, and he honestly believes the representation to be true, he is not guilty of gross negligence, if he abstains from further inquiry on the subject.[5] The fact that the person with whom he is dealing, and who makes the representation, may be his own solicitor, is immaterial, if the representation was honestly believed to be true.[6]

A representation or an answer to an inquiry will not, however, dispense with the necessity of further inquiry, unless it be made by a person upon whose representation the other party is entitled to rely and rest satisfied. The representations of a man bind him as far as his own interest is concerned, but

[1] Stewart's Case, L. R. 1 Ch. App. 574. See Webster's Case, L. R. 2 Eq. 741.

[2] Kisch *v.* Central Venezuela Railway Co., 3 D. J. & S. 122.

[3] Jones *v.* Smith, 1 Ha. 43; Bird *v.* Fox, 11 Ha. 47; Jones *v.* Williams, 24 Beav. 47; Dawson *v.* Prince, 2 D. & J. 44; Espin *v.* Pemberton, 3 D. & J. 547; Carter *v.* Carter, 3 K. & J. 618.

[4] Hewitt *v.* Loosemore, 9 Ha. 449; Espin *v.* Pemberton, 3 D. & J. 547, *supra*, p. 141.

[5] Roberts *v.* Croft, 2 D. & J. 1; Hunt *v.* Elmes, 2 D. F. & J. 578.

[6] Roberts *v.* Croft, 2 D. & J. 1; Hunt *v.* Elmes, 2 D. F. & J. 578. See Perry *v.* Holl, *ib.* 38; Cory *v.* Eyre, 1 D. J. & S. 168.

do not bind the interests of other parties, unless he was authorized by them to make the representations. An under-lessee must not rest satisfied with the representations of his lessor, who is also a sub-lessee, as to the covenants in the lease. He must go back to some one who can give him more complete information.[1] Nor should a man who deals with an agent having a limited authority rest satisfied with his representations as to the extent of his authority, but should refer to the principal for further information.[2] So, also, a man who accepts a conveyance without any previous investigation, relying on the mere assurances of the vendor that he is absolute owner, will be held to have constructive notice of the title, although he may have acted without any fraudulent intention.[3]

The effect of what would be otherwise notice may be destroyed not only by actual misrepresentation, but by mere silence, or by anything calculated to deceive, or even lull suspicion on a particular point.[4] If the vendor of a lease be informed by the purchaser of his object in buying, and the lease contains covenants which will defeat that object, the silence of the vendor is equivalent to a misrepresentation.[5] But if the agent of the purchaser has had the opportunity of inspecting the original lease, the vendor need not inform the purchaser of unusual covenants which will prevent him from carrying out his intention.[6]

Although a man who has been induced to enter into a transaction by misrepresentation might have detected the mis-

[1] Parker *v.* Whyte, 1 H. & M. 167. See Clements *v.* Welles, L. R. 1 Eq. 200.

[2] Wilson *v.* Hart, 2 H. & M. 551, L. R. 1 Ch. App. 463.

[3] Jackson *v.* Rowe, 2 Sim. & St. 472, 475. See Jones *v.* Smith, 1 Ph 255; Neesom *v.* Clarkson, 2 Ha. 173; West *v.* Reid, *ib.* 260; Proctor *v.* Cooper, 2 Drew. 1, affd. 1 Jur. N. S. 149; Howard *v.* Chaffers, 2 Dr. & Sm. 236.

[4] Pope *v.* Garland, 4 Y. & C. 394; Bartlett *v.* Salmon, 6 D. M. & G. 41; Darlington *v.* Hamilton, Kay, 550, Dart, V. & P. 75, *supra*, p. 91.

[5] Flight *v.* Barton, 3 M. & Cl. 282.

[6] Morley *v.* Clavering, 29 Beav. 84.

representation long before the time he did, he is not bound to make inquiries, until there is something to raise suspicion.[1]

Constructive notice only operates in cases affecting title. A mere constructive notice of circumstances of negligence in the mode of conducting a sale is entirely collateral to any question of title.[2]

It is not necessary that notice should be brought home to the party interested himself. It is enough, if it is brought home to his agent, solicitor, or counsel.[3] There is no distinction in point of legal effect between personal notice to the party and notice affecting him through the medium of his agent.[4] Notice to the agent is notice to the principal: for upon general principles of public policy it must be taken for granted that the principal knows whatever the agent knows.[5]* As a general rule, the principal is deemed to have notice of whatever is communicated to his agent whilst acting as such in the transaction to which the communication relates.[6] The principal or client is fixed with the knowledge of every fact material to the transaction which his agent or solicitor either knows or has imparted to him in the course of his employment, and which it was his duty to communicate, whether it be communicated or not.[7] The rule that notice to an agent is

[1] Rawlins *v.* Wickham, 3 D. & J. 304.
[2] Borell *v.* Dann, 2 Ha. 440.
[3] Bath and Montagu's Case, 3 Ch. Ca. 110; Brotherton *v.* Hatt, 2 Vern. 574; Maddox *v.* Maddox, 1 Ves. 60; Hughes *v.* Garner, 2 Y. & C. 328; Archer *v.* Hudson, 15 L. J. Ch. 211.
[4] Toulmin *v.* Steere, 3 Mer. 224.
[5] Bank of United States *v.* Davies, 2 Hill (Amer.) 461.
[6] Sandford *v.* Handy, 23 Wend. (Amer.) 268; Bank of United States *v.* Davies, 2 Hill (Amer.), 452.
[7] Sheldon *v.* Cox, Amb. 624; Roddy

* Hovey *v.* Blanchard, 19 N. H. 145; Ross *v.* Houston, 25 Miss. 591; Jones *v.* Bamford, 21 Iowa, 217; Miller *v.* Fraley, 21 Ark. 22; Walker *v.* Ayres, 1 Clarke, 449; Ingalls *v.* Morgan, 10 N. Y. 178; Smith *v.* Oliver, 31 Ala. 39; Worden *v.* Williams, 24 Ill. 67; Reed's Appeal, 34 Penn. 207; Willis *v.* Vallette, 4 Met. (Ky.) 186.

Notice to a man is not notice to his wife. Sponable *v.* Snyder, 7 Hill, 427.

notice to the principal applies to cases where the principal is an infant.[1]

The notice which affects a principal or client through his agent or solicitor is generally treated as constructive notice;[2] but inasmuch as the principal or client is bound by the notice whether it be communicated to him or not, and is not presumed to have the knowledge, merely because the circumstances of the case put him on inquiry, such notice may more properly be treated as actual notice, or if it is necessary to make a distinction between the knowledge which a man possesses himself and that which is known to his agent or solicitor, the latter may be called imputed knowledge.[3]

Notice to an agent, solicitor, or counsel should, in order to bind a principal or client, be notice in the same transaction.[4] * But the rule is subject to a qualification where, from the surrounding circumstances, or from the one transaction being so closely connected with another, the agent or solicitor must be presumed to have remembered the previous one. In all such cases the notice, though not in the same transaction, is nevertheless binding.[5] †

v. Williams, 3 J. & L. 16; Marjoribanks, *v.* Hovenden, Dru. 11; Cannock *v.* Jauncey, 27 L. J. Ch. 57; Espin *v.* Pemberton, 3 D. & J. 554; Wyllie *v.* Pollen, 32 L. J. Ch. 782; Boursot *v.* Savage, L. R. 2 Eq. 134. See Taml. 176, *per* Sir J. Leach, M. R.; Spaight *v.* Cowne, 1 H. & M. 359.

[1] Toulmin *v.* Steere, 3 Mer. 222.

[2] See Toulmin *v.* Steere, 3 Mer. 222.

[3] 3 D. & J. 554, *per* Lord Chelmsford. See Mayhew *v.* Eames, 3 B. & C. 601; Cookson *v* Lee, 23 L. J. Ch. 473; Eyre *v.* Burmester, 10 H. L. 103. Comp. Wilde *v.* Gibson, 1 H. L. 605.

[4] Fitzgerald *v.* Fauconberg, Fitzg. 211; Warrick *v.* Warrick, 3 Atk. 290; Worsley *v.* Lord Scarborough, *ib.* 392; Hiern *v.* Mill, 13 Ves. 114; Edgecumbe *v.* Stranger, 1 Jur. 400; Fuller *v.* Bennett, 2 Ha. 394; Tylee V. Webb, 6 Beav. 552; Finch *v.* Shaw 19 Beav. 500; Colyer *v.* Finch, 5 H. L. 905. See Steed *v.* Whitaker, Barnard's Ch. 220; Hamilton *v.* Royse, 2 Sch. & Lef. 315; Mountford *v.* Scott, 3 Madd. 34, T. & R. 274.

[5] Toulmin *v.* Steere, 3 Mer. 222; Hargreaves *v.* Rothwell, 1 Keen, 154; Nixon *v.* Hamilton, 2 Dr. & Wal. 391;

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* McCormick *v.* Wheeler, 36 Ill. 114; Bracken *v.* Miller, 4 W. & S. 102; Hood *v.* Fahnestock, 8 Watts, 489; Grant *v.* Cole, 8 Ala. 519; Lawrence *v.* Tucker, 7 Greenl. 195; Boyd *v.* Vanderkemp, 1 Barb. 287.

† Hart *v.* Farmers', &c. Bank, 33 Vt. 252; Blumenthal *v.* Brainerd, 38 Vt. 410; The Distilled Spirits, 11 Wall. 356.

The rule that notice to an agent or solicitor is notice to a principal or a client, applies where the same solicitor or agent is employed by both parties to the transaction,[1] or is himself the vendor.[2] The mere circumstance, however, of there being only one solicitor in the business does not necessarily constitute him the solicitor of both parties so as to affect both with notice. It does not follow that if there be not a solicitor employed on both sides, the solicitor who does act is the solicitor of both parties. To have this effect, there must be a consent to accept him as such, or something equivalent thereto.[3]

The rule that notice to a solicitor is notice to the client applies only as between parties dealing hostilely with each other.[4]

It is not every description of knowledge possessed by a solicitor employed in any particular transaction that can be treated as the actual knowledge of the client. All matters affecting the title to property, or the interests of other persons in connection with it, all circumstances which would entitle parties to equitable priorities, or change the character of rights,

Fuller *v.* Bennett, 2 Ha. 394; Gerard *v.* O'Reilly, 3 Dr. & War. 414; Marjoribanks *v.* Hovenden, Dru. 11. See Edgecumbe *v.* Stranger, 1 Jur. 400; *Re* Smallman's Estate, Ir. L. R. 2 Eq. 34. Comp. Wilde *v.* Gibson, 1 H. L. 605; but see Sug. L. P. 641.

[1] Le Neve *v.* Le Neve, 3 Atk. 646; Toulmin *v.* Steere, 3 Mer. 210; Fuller *v.* Bennett, 2 Ha. 394; Dryden *v.* Frost, 3 M. & C. 670; Roddy *v.* Williams, 3 J. & L. 16; Frail *v.* Ellis, 16 Beav. 350; Tweedale *v.* Tweedale, 23 Beav. 341; Atterbury *v.* Wallis, 8 D. M. & G. 454; Ogilvie *v.* Jeaffreson, 2 Giff. 353; Spaight *v.* Cowne, 1 H. & M. 359; Boursot *v.* Savage, L. R. 2 Eq. 134.

[2] Sheldon *v.* Cox, Amb. 624; Dryden *v.* Frost, 3 M. & C. 670; Marjoribanks *v.* Hovenden, Dru. 11; Robinson *v.* Briggs, 1 Sm. & G. 188; *Re* Rorke's Estate, 13 Ir. Ch. 371.

[3] Espin *v.* Pemberton, 4 Drew. 333, 3 D. & J. 547; Wythes *v.* Labouchere, 3 D. & J. 594; Lloyd *v.* Attwood, *ib.* 614; Perry *v.* Holl, 2 D. F. & J. 38. See Le Neve *v.* Le Neve, 3 Atk. 646; Kendall *v.* Hulls, 11 Jur. 864; Hewitt *v.* Loosemore, 9 Ha. 449; Cobbett *v* Brock, 20 Beav. 524; Atterbury *v* Wallis, 8 D. M. & G. 454, Sug. V. & P. 772. Comp. Tweedale *v.* Tweedale, 23 Beav. 341.

[4] Austin *v.* Tawney, L. R. 2 Ch. App 143.

Notice communicated to an agent by mere rumor and talk upon the street corners, is not knowledge that will bind the principal. Keenan *v.* Missouri, &c. Ins. Co. 12 Iowa, 126.

which depend upon want of notice, if known to the solicitor, have the same effect as if actually known to the client. But this imputed knowledge will not extend to matters which have no reference to rights created or affected by the transaction, but which merely relate to the motives and objects of the parties, or to the consideration upon which the matter is founded.[1] Nor does the employment of a solicitor to do a mere ministerial act, such as the procuring the execution of a deed, so constitute him an agent, as to affect his employer with notice of matters within his knowledge.[2]

The rule that notice to a solicitor is notice to the client applies, notwithstanding that the solicitor may be perpetrating a fraud upon the client in the transaction.[3] The commission of a fraud being beyond the scope of the authority of a solicitor, the fraud of a solicitor cannot of course be imputed to the client.[4] But the fact that a solicitor may be committing a fraud in relation to a transaction, in which he is employed, can not afford any reason why the client should not be affected with constructive knowledge of the facts. The constructive knowledge of all the facts must be imputed to him whether there is fraud relating to the transaction or not. The solicitor is the *alter ego* of the client. The client stands in precisely the same situation as the solicitor does in the transaction, and therefore the knowledge of the solicitor is the knowledge of the client. It would be a monstrous injustice that the client should have the advantage of what the solicitor knows without the disadvantage.[5] In determining the equities, however,

[1] *Per* Lord Chelmsford, 10 H. L. 114.
[2] Wyllie *v.* Pollen, 32 L. J. Ch. 782.
[3] Boursot *v.* Savage, L. R. 2 Eq. 134. See Roddy *v.* Williams, 3 J. & L. 16.
[4] Kennedy *v.* Green, 3 M. & K. 699; Roddy *v.* Williams, 3 J. & L. 16; Espin *v.* Pemberton, 3 D. & J. 547; Perry *v.* Holl, 2 D. F. & J. 38; Ogilvie *v.* Jeaffreson, 2 Giff. 374. See Marjoribanks *v.* Hovenden, Dru. 11; Kendall *v.* Hulls, 11 Jur. 864; Eastham *v.* Wilkinson, 33 L. T. 234; Spaight *v.* Cowne, 1 H. & M. 365; Thompson *v.* Cartwright, 33 Beav. 185; 2 D. J. & S. 10; *re* Rorke's Estate, 13 Ir. Ch. 271.
[5] *Per* Kindersley, V.-C.; Boursot *v.* Savage, L. R. 2 Eq. 134. See Bowles *v.* Stuart, 1 Sch. & Lef. 222; Nixon *v.*

between parties who have been defrauded by a common solicitor, the court looks to see whether there has been anything in the transaction calculated to put either of the parties upon inquiry. If there be anything in the case calculated to excite suspicion, or to put either of the parties upon inquiry, and he abstains from inquiry, the same knowledge will be imputed to him as he would have been affected with, had he employed an independent solicitor.[1]

Notice to one partner of a trading partnership is notice to the other partners.[2] * A partner, however, is not necessarily fixed with notice of the contents of his own books.[3]

The rule that notice to one partner is notice to the other partners does not apply to the case of corporations or joint-stock companies. Notice on the part of a share-holder, or non-acting director, does not affect the whole body;[4] † but notice to one of the persons legally intrusted with the proper business to which the notice relates, or who has authority to act for the corporation in the particular matter in regard to which the notice is given, will bind the corporation.[5] ‡ Notice,

Hamilton, 2 Dr. & Wal. 391; Toulmin *v.* Steere, 3 Mer. 222; Hewitt *v.* Loosemore, 9 Ha. 449; Atterbury *v.* Wallis, 8 D. M. & G. 457; Rorke's Estate, 13 Ir. Ch. 271; Bank of United States *v.* Davies, 2 Hill (Amer.), 461.

[1] Kennedy *v.* Green, 3 M. & K. 699; Frail *v.* Ellis, 16 Beav. 357; Ogilvie *v.* Jeaffreson, 2 Giff. 374; Atterbury *v.* Wallis, 25 L. J. Ch. 794; Perry *v.* Holl, 2 D. F. & J. 38. See Greenslade *v.* Dare, 20 Beav. 284; Eastham *v.* Wilkinson, 33 L. T. 234.

[2] Atkinson *v.* Macreth. 35 L. J. Ch. 624; Lindl. on Partnr. 294.

[3] See Stewart's Case, L. R. 1 Ch. App. 574.

[4] Powles *v.* Page, 3 C. B. 16; *re* Carew's Estate, 31 Beav. 45.

[5] Worcester Corn Exchange Co., 3 D.

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* Watson *v.* Wells, 5 Ct. 468; Middleton &c. Bank *v.* Dubuque, 19 Iowa, 467; Baugher *v.* Duphoin, 9 Gill, 314.

† Housatonic Bank *v.* Martin, 1 Met. 294; Custer *v.* Tompkins County Bank, 9 Penn. 27; Bank of Pittsburgh *v.* Whitehead, 10 Watts, 397; Union Canal Co. *v.* Lloyd, 4 W. & S. 393.

‡ Porter *v.* Bank of Rutland, 19 Vt. 410; Fulton Bank *v.* New York &c. Canal Co., 4 Paige, 127; Banks *v.* Martin, 1 Met. 308; Bank of United States *v.* Davis, 2 Hill, 451; National Bank *v.* Norton, 1 Hill, 575; Mechanics' Bank of Alexandria *v.* Seton, 1 Pet. 299.

however, to the officer of a corporation, or knowledge obtained by him whilst not engaged officially in the business of the company, is inoperative as notice to the latter. * But in the case of a joint agency (*e. g.*, the directors of a company), notice to either whilst engaged in the business of his agency is notice to the principal.[1]

A shareholder in a company formed under the Companies' Act, 1862, is not necessarily fixed with a knowledge of the contents of the memorandum or articles of association of the company.[2] But he must, within a reasonable time after the registration of the memorandum and articles of association, be presumed to acquaint himself with their contents. After the lapse of a reasonable time he cannot be heard to say that he had no knowledge of their contents. What will be a reasonable time may in some degree vary in different cases, but must always be measured with reference to the thing to be done.[3]

The shareholders in a company are not bound to look into the management, and will not be held bound to have notice of everything which has been done by the directors, who may be assumed by the shareholders to have done their duty.[4] But if a transaction be inserted in the books of a company, the shareholders will be fixed with notice of it.[5]

The registration of an assurance is not of itself notice. A prior equitable incumbrance will not, although registered,

M. & G. 183; *re* Carew's Estate, 31 Beav. 45; Parsons on Contracts. p. 65.

[1] Bank of United States *v.* Davies, 2 Hill (Amer.), 462. But see Story on Agency, §§ 140 *a*, 140 *b*.

[2] Stewart's Case, L. R. 1 Ch. App. 574.

[3] Lawrence's Case, L. R. 2 Ch. App. 425; Wilkinson's Case, *re* Madrid Bank, *ib.* 540.

[4] Stanhope's Case, L. R. 1 Ch. App. 161. But see Walford *v.* Adie, 5 Ha. 112, 119.

[5] Spackman's Case, 34 L. J. Ch. 321, 325; Stanhope's Case, L. R. 1 Ch. App. 161.

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* Lyne *v.* Bank of Kentucky, 5 J. J Marsh. 545; General Ins. Co. *v.* United States Ins. Co., 10 Md. 517; United States Ins. Co. *v.* Shriver, 3 Md. Ch. 381; Washington Bank *v.* Lewis, 22 Pick. 24; Farrell Foundry Co. *v.* Dart, 26 Ct. 376.

affect a subsequent purchaser without notice who has obtained the legal estate.[1] * But if a purchaser search the register, he

[1] Morecock *v.* Dickens, Amb. 678; Bushell *v.* Bushell, 1 Sch. & Lef. 98.

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* The registration of a deed is constructive notice to a subsequen purchaser. Hughes *v.* Edwards, 9 Wheat. 489; Lasselle *v.* Barnett, Blackf. 130; Peters *v.* Goodrich, 3 Ct. 146; Smith *v.* Prince, 14 Ct. 4 Todd *v.* Benedict, 15 Iowa, 591; Schutt *v.* Large, 6 Barb. 373.

The record of a deed not required by law to be recorded is n structive notice. Villard *v.* Roberts, 1 Strobh. Eq. 393; Common *v.* Rodes, 6 B. Mon. 171; Thomas *v.* Grand Gulf Bank, 9 Smed. & 201; Lewis *v.* Baird, 3 McLean, 56; Reed *v.* Coale, 4 Ind. 283; Burnham *v.* Chandley, 15 Tex. 441; Bossard *v.* White, 9 Rich's Eq. 483; Parrett *v.* Shaubhut, 5 Minn. 323; Galpin *v.* Abbott, 6 Mich. 17.

The record of a deed deficient in some statutory requirement is not constructive notice of its existence. Carter *v.* Champion, 8 Ct. 549; Sumner *v.* Rhodes, 14 Ct. 135; Moore *v.* Auditor, 3 Hen. & M. 235; Doswell *v.* Buchanan, 3 Leigh, 365; Duphey *v.* Frenage, 5 Stew. & Port. 215; Johns *v.* Reardon, 3 Md. Ch. 57; Choban *v.* Jones, 11 Ill. 300; Isham *v.* Bennington Iron Co., 19 Vt. 230; Schultz *v.* Moore, 1 McLean, 520; De Witt *v.* Moulton, 5 Shep. 418; Galt *v.* Dibrell, 10 Yerg. 146; Harper *v.* Reno, 1 Freem. Ch. 323.

Record is constructive notice only to those claiming under the grantor by whom the deed was made. Tilton *v.* Hunter, 11 Shep. 29; Crockett *v.* Maguire, 10 Mo. 34; Lily *v.* Wolf, 10 Ohio, 83; Stuyvesant *v.* Hall, 2 Barb. Ch. 158; Murray *v.* Ballou, 1 Johns. Ch. 574; Keller *v.* Nutz, 5 S. & R. 252; Lightney *v.* Mooney, 10 Watts, 412; Bates *v.* Norcross, 14 Pick. 224; Blake *v.* Graham, 6 Ohio St. R. 580.

A deed properly left with the clerk for record will be considered as recorded from the time when it was so left, although it has been lost and never recorded through the negligence of the clerk. Beverly *v.* Ellis, 1 Rand. 102; Nichols *v.* Reynolds, 1 Angell, 30.

An incorrect entry in the index book will not impart constructive notice to a subsequent purchaser. Breed *v.* Conley, 14 Iowa, 269; Gwynn *v.* Turner, 18 Iowa, 1.

Where the state of the title is such that there is nothing to connect the name or interests of a third person with the property, it is unreasonable to impute notice of the interests of such third person to a purchaser, for no ordinary prudence can detect it. Lily *v.* Wolf, 10 Ohio, 83; Murray *v.* Ballou, 1 Johns. Ch. 566; Sanger *v.* Craigar, 10 Vt. 555; Jenning *v.* Wood, 20 Ohio, 261; Filton *v.* Pitneau, 14 Geo. 530.

The recording of a deed from the true owner in his right name, though

will be presumed to have notice, unless the presumption can be rebutted by showing that the search was made for a period only in which the registered deeds are not included.[1] There is a material distinction in the effect of registration between the register acts of Ireland and those of England. By the Irish Act 6 Anne, c. 2, an absolute priority is expressly given to the instrument first registered, so that a subsequent purchaser, having the legal estate, though he has not notice of an equitable estate previously registered, will be bound and compelled to give effect to it.[2]

At law, notwithstanding notice, mere priority of registration absolutely determines the right to the property as between persons claiming under adverse registered instruments, purporting to pass the legal estate;[3] but in equity, notwithstanding the stringent language of the Registration Acts, registra-

[1] Hodgson *v.* Dean, 2 Sim. & St. 221, affd. See Sug. V. & P. 761. Comp. Procter *v.* Cooper, 2 Drew. 1; 1 Jur. N. S. 149.

[2] Bushell *v.* Bushell, 1 Sch. & Lef. 98; Latouche *v.* Lord Dunsany, *ib.* 159, 160; Drew *v.* Lord Norbury, 3 J. & L. 267; Mill *v.* Hill, 3 H. L. 828.

[3] Doe *v.* Alsop, 5 B. & Ald. 142.

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different from the name by which he acquired it, is constructive notice of such deed. Fallon *v.* Kehoe, 38 Cal. 44.

When there is a material variance between the record copy and the deed, the record is not constructive notice. Frost *v.* Beekman, 1 Johns. Ch 288; Sawyer *v.* Crane, 10 Vt. 553; Baldwin *v.* Marshall, 2 Humph. 116; Jennings *v.* Wood, 20 Ohio, 261; Miller *v.* Bradford, 12 Iowa, 14.

Fraud can not be inferred from mere delay in putting a deed on record, if the grantee has used all the dispatch which the law requires. If subsequent purchasers without notice sustain an injury within the time allowed for recording a deed, the injury is to be ascribed to the law. Sherras *v.* Craig, 7 Cranch, 34.

A party cannot be permitted to take a deed from another for his own security, and leave the grantor in possession, and ostensibly the owner, and withhold it from record for an indefinite period, renewing it periodically, and then receive the benefit of it by placing the last renewal upon the record. All the renewals are mere continuations of the first deed, and the time for recording begins to run from its date. Gill *v.* Griffith, 2 Md. Ch. 270.

tion is no protection against an unregistered assurance of which the party claiming under the registered instrument had notice prior to the completion of his purchase or security.[1] The object of the Registration Acts being to give notice, the evils against which those statutes intended to guard do not exist where a man has notice independently of the registry. If, therefore, a man having such notice seeks to defeat a prior charge on the pretence that he had no notice by means of the registry, it is a fraud in the sense of a court of equity.[2]* The notice must, however, be clear and distinct.[3] † The same rules in regard to notice apply to cases under the Registry Acts as to all other cases.[4] Constructive notice of a prior unregistered assurance affecting lands in Middlesex, is as effectual as actual notice.[5]

[1] Le Neve *v.* Le Neve, 3 Atk. 636; Eyre *v.* M'Dowell, 9 H. L. 619; Re Rorke's Estate, 13 Ir. Ch. 271. See Nixon *v.* Hamilton, 2 Dr. & Wal. 391; Benham *v.* Keane, 1 J. & H. 685; 3 D. F. & J. 318.

[2] Sheldon *v.* Cox, 2 Eden, 224; Bushell *v.* Bushell, 1 Sch. & Lef. 102; Eyre *v.* M'Dowell, 9 H. L. 619, 646; Chadwick *v.* Turner, L. R. 1 Ch. App. 310.

[3] Wyatt *v.* Barwell, 19 Ves. 435; Chadwick *v.* Turner, L. R. 1 Ch. Ap. 310.

[4] Whitbread *v.* Jordan, 1 Y. & C. 303; Ford *v.* White, 16 Beav. 120; Wormald *v.* Maitland, 35 L. J. Ch. 69.

[5] *Ib.* See Nixon *v.* Hamilton, 2 Dr. & Wal. 391; Rochard *v.* Fulton, 1 J. & L. 413.

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* Dunham *v.* Dey, 15 Johns. 568; Lupton *v.* Cornell, 4 Johns. Ch. 262; Ohio Life Ins. Co. *v.* Ledyard, 8 Ala. 866; Ingram *v.* Philips, 3 Strobh. 565; Knotts *v.* Ginger, 4 Rich. 32; Smith *v.* Hall, 28 Vt. 364; Dickenson *v.* Braden, 30 Ill. 279; Doe *v.* Reed, 4 Scam. 117; Warnock *v.* Wrightman, 1 Brevard, 331; Hudson *v.* Warner, 2 H. & G. 415; Morton *v.* Robards, 4 Dana, 258; Jackson *v.* Leek, 19 Wend. 339.

† Taylor *v.* Heriot, 4 Dessau. 227; Wallace *v.* Craps, 3 Strobh. 266; Porter *v.* Sevey, 43 Me. 519.

Constructive notice is not sufficient. The notice must be such as will, with the surrounding circumstances, affect the purchaser with fraud. Dey *v.* Dunham, 2 Johns. Ch. 182; City Council *v.* Page, Spear's Ch. 159; Spofford *v.* Weston, 29 Me. 140; Hopping *v.* Burnam, 2 Iowa, 39; *contra*, Newman *v.* Chapman, 2 Rand. 93; Rogers *v.* Jones, 8 N. H. 264; Doe *v.* Reed, 4 Scam. 117; Parks *v.* Willard, 1 Tex. 350.

A voluntary unrecorded conveyance is valid against any subsequent voluntary conveyance by the grantor. Way *v.* Lyon, 3 Blackf. 76.

The same principles were held under the old law to apply to the case of a purchaser with notice of undocketed judgments,[1] but under the new law a purchaser even with notice is not bound by a judgment, unless it has been duly registered in the Common Pleas;[2] nor will notice of a registered judgment affect a purchaser, unless it has been re-registered in due time.[3] As between judgment creditors notice is not material.[4]

Purchasers of lands in Middlesex are bound by notice of unregistered or undocketed judgments, but as between judgment creditors notice is not material. A prior judgment creditor has no equity against a subsequent judgment creditor, who has registered with notice.[5]

The registration of a judgment is not notice,[6] unless a search has been made for judgments, in which case notice will be presumed;[7] but it seems that a title depending on the fact of the vendor having been a purchaser without notice of a registered judgment cannot be forced on a purchaser.[8]

SECTION V.—MISCELLANEOUS FRAUDS.

FRAUD UPON POWERS.

A class of frauds against which courts of equity will relieve, are frauds upon powers.

There is a fraud upon a power if a man, having a power of appointment, corruptly exercises the power with a view to his own personal benefit and advantage. An appointment under

[1] Davis *v.* Lord Strathmore, 16 Ves. 419; Sug. V. & P. 521.

[2] Sug. V. & P. 533.

[3] 18 Vict. c. 15, § 5. See Beavan *v.* Lord Oxford, 6 D. M. & G. 492; Shaw *v.* Neale, 6 H. L. 584; Benham *v.* Keane, 1 J. & H. 685; 3 D. F. & J. 318; Evans *v.* Williams, 34 L. J. Ch. 485.

[4] Benham *v.* Keane, 1 J. & H. 685; 3 D. F. & J. 318. See Evans *v.* Williams, 34 L. J. Ch. 485.

[5] Benham *v.* Keane, 3 D. F. & J. 318

[6] Churchill *v.* Grove, 1 Ch. Ca. 35; Freem. Ch. Ca. 176; Lane *v.* Jackson, 20 Beav. 535.

[7] Proctor *v.* Cooper, 2 Drew. 1; 1 Jur. N. S. 149.

[8] Freer *v.* Hesse, 4 D. M. & G. 495.

a power, accordingly, will be set aside in equity if it appear that the person in whose favor the power has been exercised has agreed or stipulated to give the owner of the power some benefit or advantage in the event of the power being exercised in his favor,[1] or if the circumstances of the case attending the execution of the power are such as to show conclusively that the appointment was made with a view to some profit ultimately accruing to the owner of the power;[2] as, for instance, where a parent, having a power of appointment among children, exercises it in favor of a son, a lunatic, in very bad health and likely to die, in which event the parent would, of course, become entitled to the fund, as the personal representative of the son.[3] So also, and for the same reason, where a parent having power to raise portions for children, appointed a portion to a child long before it was required, and the child died shortly afterward, the appointment was held invalid.[4] So also an appointment by a parent in favor of a daughter, with a view to obtaining the benefit of the fund so appointed, through the exercise of undue parental influence over her, would be held invalid.[5]

There is a very material distinction between powers to appoint portions to be raised for children, and powers to appoint to children a fund actually set apart or provided. Under a power of the former class, an appointment whereby a portion is raised for a child before it is wanted, carries with itself the evidence of fraud, even though the terms of the power authorize the parent to raise the portion whenever he thinks proper.[6]

[1] Lane *v.* Page, Ambl 233; Palmer *v.* Wheeler, 2 Ba. & Be. 31; Farmer *v.* Martin, 2 Sim. 511; Arnold *v.* Hardwick, 7 Sim. 343; Jackson *v.* Jackson, 7 Cl. & Fin. 977; Rowley *v.* Rowley, Kay, 242; Reid *v.* Reid, 25 Beav. 478. See Askham *v.* Barber, 17 Beav. 44.

[2] Humphrey *v.* Oliver, 28 L. J. Ch. 406

[3] Wellesley *v.* Mornington, 2 K. & J. 143.

[4] Lord Hinchinbrooke *v.* Seymour, 1 Bro. C. C. 395; Wellesley *v.* Mornington, 2 K. & J. 143.

[5] Re Marsden's Trusts, 4 Drew. 601.

[6] Lord Hinchinbrooke *v.* Seymour, 1 Bro. C. C. 395.

Under a power of the latter class, however, shares may be appointed to a child so as to vest long before they are required. A *bonâ fide* appointment to a child of very tender age, and in good health, of an estate or fund which has been previously set apart or provided for the benefit of children, is in itself no sign of fraud. It is of no consequence that the child may die shortly afterward, if it was in good health at the time the power was exercised. If the power be in other respects well executed, it is immaterial that it may have in fact been exercised with the object of providing that in any event the persons entitled in remainder on failure of children shall not take the estate or fund.[1]

If a person be the only child who has been kind to a parent in distress, there is no fraud if the parent exercises a power of appointment in his favor.[2] Nor is there fraud if a parent exercises a power of appointment in favor of two of his sons, to enable them to embark in business, and then, at their request, becomes a partner with them in the business, there being no evidence to prove any bargain between them in the event of his exercising the power in a particular way.[3] An appointment, however, to one of several objects of a power in payment of a debt due to him from the appointer is bad.[4]

Although an appointment by a parent in favor of a child, over whom he exercises undue influence, cannot be supported,[5] it is otherwise if the exercise of undue influence be disproved.[6] A child to whom property has been appointed by a parent may, in such a case, give the parent a benefit or advantage in the property so appointed.[7]

[1] Butcher *v.* Butcher, 14 Sim. 444; Fearon *v.* Desbrisay, 14 Beav. 635; Beere *v.* Hoffmeister, 23 Beav. 101.

[2] Wheeler *v.* Palmer, 2 Ba. & Be. 31.

[3] Cockcroft *v.* Sutcliffe, 2 Jur. N. S. 323.

[4] Reid *v.* Reid, 25 Beav. 478. See Beddoes *v.* Pugh, 26 Beav. 411.

[5] *Re* Marsden's Trusts, 4 Drew. 601. See Topham *v.* Duke of Portland, 1 D. J. & S. 517.

[6] See *supra*, p. 181.

[7] Davis *v.* Uphill, 1 Sw. 136; Warde *v.* Dickson, 5 Jur. N. S. 699.

In an arrangement settling the interests of all the branches of a family, children may contract with each other to give to a parent, who had power to distribute property among them, some advantage which the parent, without their contract with each other, could not have.[1]

In order, however, to constitute a fraud upon a power, it is not necessary that the object of the exercise of the power should be the personal benefit or advantage of the donee of the power. If the design of the donee in exercising the power is to confer a benefit, not upon himself actually, but upon some other person not being an object of the power, that motive just as much interferes with and defeats the purpose for which the power was created as if it had been for the personal benefit of the donee himself. If the donee of a power of appointment exercises the power in favor of one of several objects of the power, with a view to the benefit of a stranger, the appointment is fraudulent and void, even although the motive of the donee is not morally wrong.[2] A man who takes property absolutely under an appointment, may do with the property so appointed as he pleases, and may settle it on persons who are not objects of the power;[3] but there is a fraud upon a power if an appointment be made upon a bargain for the benefit of persons who are not objects of the power.[4] The appointment, accordingly, of a portion of a fund to a daughter, for the purpose of paying her husband's debts, was held void.[5] So also, where a married woman, having a power to appoint a fund of which she received the income for her life, appointed the whole fund at her death absolutely in favor of her daughter, in order that thereout the daughter should benefit the father, the appointment was held invalid.[6]

[1] Davis *v.* Uphill, 1 Sw. 136.
[2] *Re* Marsden's Trusts, 4 Drew. 601.
[3] Routledge *v.* Dorrill, 2 Ves. Jr. 357. See Birley *v.* Birley, 25 Beav. 299.
[4] Birley *v.* Birley, *ib.*; Pryor *v.* Pryor, 2 D. J. & S. 205.
[5] Ranking *v.* Barnes, 12 W. R. 568.
[6] *Re* Marsden's Trusts, 4 Drew. 601.

The principle has been held even to apply to a case where an arrangement was entered into between the original donor and creator of the power and any of the objects of the power, to benefit persons other than those within the power.[1] The principle that the donee of a power may not appoint to a person who is not an object of the power applies even although the appointee is not privy to the intentions of the donee of the power. The design to defeat the purpose for which the power was created will stand just the same whether the appointee was aware of it or not.[2] Where, accordingly, a married woman, having a power to appoint a fund of which she received the income for her life among her children, appointed the whole fund at her death in favor of her daughter, in order that thereout the daughter should benefit her father, relying on the influence which the father would have over her to carry out the secret arrangement, the appointment was held invalid, although the daughter was not informed of the mother's intention until after her mother's death.[3]

Although children may contract with each other to give to a parent, who has power to distribute property among them, some advantage which the parent, without their contract with each other, would not have,[4] a transaction of the sort cannot be upheld if, taken as a whole, it appears not to be a *bona fide* family arrangement, but to have been entered into in fraud of the power, for the purpose of giving a benefit to a person who was by the donor excluded from being an appointee or from deriving any advantage from the exercise of the power.[5]

There is a fraud upon a power, not only where it is exercised in favor of persons who are not the proper objects of the power, but also where it is exercised for purposes foreign to those

[1] Lee *v.* Fernie, 1 Beav. 483.
[2] *Re* Marsden's Trusts, 4 Drew. 601.
[3] *Ib.* See Ranking *v.* Barnes, 12 W. R. 568.
[4] Davis *v.* Uphill, 1 Sw. 136.
[5] Agassiz *v.* Squire, 18 Beav. 431.

for which the power was created.[1] The donee of the power shall, at the time of the exercise of the power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any object which is beyond the purpose and intent of the power.[2] It is accordingly, a fraud upon a power, if a man having a power to appoint among two sisters appoints the whole to one of them, it being understood that she was only to receive one moiety of the fund to her own use, and was to allow the other to accumulate, subject to some future arrangement.[3] In determining whether there is a fraud upon a power, the court looks to the purpose with which the power was exercised.[4] In Scroggs *v.* Scroggs,[5] the consent of a trustee was necessary to the exercise of a power, and the donee of the power procured the trustee's consent by a false representation, to which the appointee does not appear to have been in any way a party; yet the court set aside the appointment.[6]

If there be a fraudulent arrangement between the donee of a power and the appointee, the bad purpose will, in general, vitiate the appointment *in toto*, and not merely the part to which the fraud extends.[7] Appointments to children, accordingly, in part fraudulent, have almost always been avoided altogether.[8] In cases, however, where the evidence enables the court to distinguish what is attributable to an authorized from what is attributable to an unauthorized purpose, the bad purpose will not affect the whole appointment.[9] So when there is a sum of money to be appointed among children,

[1] Topham *v.* Duke of Portland, 1 D. J. & S. 570.
[2] Duke of Portland *v.* Topham, 11 H. L. 54, *per* Lord Westbury.
[3] *Ib.* 32.
[4] Topham *v.* Duke of Portland, 1 D. J. & S. 570.
[5] Ambl. 272.
[6] *Per* Turner, L. J., 1 D. J. & S. 570.
[7] Daubeny *v.* Cockburn, 1 Mer. 626.
[8] *Ib.* Farmer *v.* Martin, 2 Sim. 511; Arnold *v.* Hardwicke, 7 Sim. 343. See Rowley *v.* Rowley, Kay, 259.
[9] Topham *v.* Duke of Portland, 1 D. J. & S. 572; *per* Turner, L. J. See Carver *v.* Richards, 27 Beav. 488; Ranking *v.* Barnes, 12 W. R. 565.

although an appointment to one child may be void on account of a corrupt agreement, an appointment to another child, although by a contemporaneous deed, if it can be severed from the previous appointment so as not to form part of the same transaction, will be valid.[1]

Although in the case of appointments to children, a fraudulent arrangement between the donee of the power and the appointee will, in general, vitiate the whole appointment, a different doctrine has been maintained in the case of appointments by way of jointure. The appointment will, in such cases, be only vitiated in the extent to which it is affected by the fraud.[2]

It was formerly held that illusory appointments under a power were void in equity, *e. g.*, appointments of a nominal instead of a substantial share to one of the members of a class where power was given to appoint among them all. An appointment of this kind was always valid at law, and it would perhaps be difficult to reconcile with principle its avoidance in equity. The doctrine has been abolished by statute.[3]

FRAUD IN THE PREVENTION BY UNDUE MEANS OF ACTS TO BE DONE FOR THE BENEFIT OF THIRD PARTIES.

There is fraud against which a court of equity will relieve, if a man be prevented by undue means from doing an act for the benefit of third parties. If a man be prevented by duress, undue influence, or other undue means, from executing an instrument, the court will treat it as if it had been executed.[4] When, for instance, a tenant in tail, meaning to suffer a recovery, was prevented on his deathbed from suffering it, by the fraud of the person whose wife was entitled in remainder,

[1] Rowley *v.* Rowley, Kay, 242. See Harrison *v.* Randall, 9 Ha. 397.

[2] Lane *v.* Page, Amb. 233; Aleyn *v.* Belcher, 1 Eden, 138, Sug. Pow. 610. See Rowley *v.* Rowley, Kay, 259.

[3] 11 Geo. IV, & 1 Wm. IV, c. 46. Butcher *v.* Butcher, 9 Ves. 382.

[4] Middleton *v.* Middleton, 1 J. & W. 96.

it was held that the estate ought to be held as if the recovery had been perfected, though even in favor of a volunteer, and against one not a party to the fraud.[1] So also when a person interested in the non-execution of a power has the deed creating the power in his custody, and the donee of the power, wishing to execute it, sends for the deed, which the party refuses to deliver, and thereupon the donee does an act with an intent to execute the power, equity will uphold the execution, although defective by reason of the fraud in the person who was to have the benefit of the original settlement.[2] But the mere refusal or neglect of an attorney with whom a deed containing a power has been deposited, to deliver it up to the donee of the power, in the absence of fraud, is no ground for relief against informality.[3] Equity would extend the relief to a case where a wife, having a power of revocation over an estate vested in her husband, is desirous to exercise it; but the husband hinders anybody from coming to her, or prevents the execution, or obstructs the engrossing of the deed of revocation.[4]

The principle applies to cases where a man has been induced by false promises to abstain from doing an act for the benefit of third parties. If, for example, a testator be induced to omit the insertion in his will of a formal provision for any intended object of his bounty, upon the faith of assurances given by his heir or other person, who would take his property in the event of his omitting to insert the particular bequest in his will, that his, the testator's, wishes shall be executed as punctually and fully as if the bequest were formally made, this promise and undertaking will raise a trust,

[1] Luttrell *v.* Olmius, cit. 11 Ves. 638; 14 Ves. 290; 1 J. & W. 96.

[2] See 3 Ch. Ca 67, 83, 84, 89, 93, 108, 122; Ward *v.* Booth, cit. 3 Ch. Ca. 69. See Fort. 383; Buckell *v.* Blenkhorn, 5 Ha. 131; West *v.* Ray, Kay, 385.

[3] Buckell *v.* Blenkhorn, 5 Ha. 131.

[4] Piggott *v.* Penrice, Com. 250; Prec. Ch. 471; Vane *v.* Fletcher, 1 P. Wms. 354; Segrave *v.* Kirwan, Beatt. 157; Bulkley *v.* Willford, 2 Cl. & Fin. 102; Nanney *v.* Williams, 22 Beav. 452.

which, though not available at law, will be enforced in equity on the ground of fraud.[1]* So, also, if a father devises an estate to one son, who engages, if the estate is devised to him, to give a certain amount of money to another son, the promise will be enforced in equity.[2] An engagement of the kind alluded to may be entered into not only by words, but by silent assent to such a proposed undertaking, which will equally raise a trust.[3]

FRAUDULENT SUPPRESSION OR DESTRUCTION OF DEEDS AND OTHER INSTRUMENTS IN VIOLATION OF OR INJURY TO THE RIGHTS OF OTHERS.

If an heir should suppress deeds, wills, &c., in order to prevent another party, as grantee or devisee, from obtaining the estate vested in him thereby, courts of equity, upon due proof by other evidence, would grant relief, and perpetuate the possession and enjoyment of the estate in such grantee or devisee.[4] If the contents of a suppressed or destroyed instrument are proved, the party will receive the same benefit as if the instrument were produced.[5]

Where there has been a spoliation or suppression of instruments, which might have thrown light upon a suit, everything will be presumed against the party by whose agent such

[1] Dutton *v.* Pool, 1 Vent. 318; Thynn *v.* Thynn, 1 Vern. 296; Sellack *v.* Harris, 5 Vin. Ab 521; Devenish *v.* Baines, Prec. Ch. 3; Oldham *v.* Litchfield, 2 Vern. 506; 2 Freem. Ch 284; Chamberlaine *v.* Chamberlaine, 2 Freem. Ch. 34; Reech *v.* Kennigate, Amb. 67; Barrow *v.* Greenough, 3 Ves 153; Mestaer *v.* Gillespie, 11 Ves. 638; Chamberlaine *v.* Agar, 2 V. & B. 262; Podmore *v.* Gunning, 7 Sim. 660; Russell *v.* Jackson, 10 Ha. 213.

[2] Stickland *v.* Aldridge, 9 Ves. 519.

[3] Byrne *v.* Godfrey, 4 Ves. 10; Paine *v.* Hall, 18 Ves. 475.

[4] Hunt *v.* Matthews. 1 Vern. 408; Wardour *v.* Berisford, *ib.* 452. cit. 2 P. Wm. 748, 749; Dalston *v.* Coatsworth, 1 P. Wms. 731; Finch *v.* Newnham, 2 Vern. 216; Barnesley *v.* Powell, 1 Ves. 289; Tucker *v.* Phipps, 3 Atk. 360. See Hornby *v.* Matcham, 16 Sim. 325.

[5] Saltern *v.* Melhuish, Amb. 247; Cowper *v.* Cowper, 2 P. Wms. 719.

* In no case has a party been successful when a reasonable doubt in regard to the promise could be entertained. Gaither *v.* Gaither, 3 Md. Ch. 158; Richardson *v.* Adams, 10 Yerg. 273.

spoliation and suppression have been practiced, and every presumption will be made in favor of the *primâ facie* rights of the other party.[1]

Primâ facie the cancellation of a deed is evidence of its discharge, but in a court of equity it is open to the party claiming under the deed to show that it was cancelled by fraud, mistake, or accident. Where the deed has always been in the hands of the party beneficially interested under it, should it appear to have been cancelled, the proof that this was done by fraud would rest with that party; but where the deed has constantly remained in the power of the maker thereof, or has been deposited by him with a person of his own selection, circumstances may throw upon the maker of the deed the *onus* of showing not only that such deed is cancelled, but that the obligation it imposed has been duly discharged and satisfied.[2]

FRAUD IN SETTING UP AN INSTRUMENT OBTAINED FOR ONE PURPOSE FOR ANOTHER PURPOSE.

Where a man obtains an instrument or conveyance from another, in order to answer one particular purpose, but afterwards makes use of it for another, a court of equity will relieve under the head of fraud. It is immaterial that the conveyance may be perfected by act of record.[3] Where, accordingly, a father, who was a tenant for life of real estate, fearing that the husband of his daughter, who was tenant in tail of the property, would waste the property, induced him and the daughter to join in a recovery, with a view to protecting the property from his creditors, and the property was conveyed to the father for a mere nominal sum, the recovery

[1] Bowles *v.* Stuart, 1 Sch. & Lef. 222; Eyton *v* Eyton, 1 Bro. P. C. 153; Hampden *v.* Hampden, *ib.* 252; Sepalino *v.* Twitty, Sel. Ca. Ch. 76.

[2] Sluysken *v.* Hunter, 1 Mer. 45.

[3] Young *v.* Peachey, 2 Atk. 256.

was set aside at the suit of the assignees in insolvency of his son-in-law.[1]

FRAUD IN ASSIGNMENTS, BY ASSIGNEES, ETC.

An assignment by the assignee of a lease or term is not a fraudulent assignment. If a man assign nominally only, retaining the beneficial enjoyment, it is fraudulent, because while he assumes to one thing, he really does another. He retains the benefit, and, by a false act, endeavors to get rid of the burthen. But if he assigns really, getting rid of the burthen, and giving up really the benefit also (if any) to his assignee, it is not a fraudulent act. His motive for parting with it, or the other's motive for receiving it, are not enough to make it fraudulent, if the act done be a real act, intended really to operate as it appears to do. The assignment even to a beggar is not fraudulent, although made in order to avoid payment of a sum of money chargeable on the property under the original agreement. The motive which induces the assignee to assign over has no bearing upon the question whether the assignment be fraudulent or not, provided the assignment is real and intended to operate, as it appears to operate.[2]

Where the assignee of a lease, subject to a mortgage, induced the lessor, a friend and client, to take advantage of a forfeiture, which was committed by the lessee expressly for that purpose, and, after the forfeiture was complete, induced the lessor to grant him a new lease of the property on the same terms, the court declared that the new lease was subject to the mortgage.[3]

[1] Young *v.* Peachy, 2 Atk. 256. See Wilkinson *v.* Brayfield, 2 Vern. 307; Goodricke *v.* Brown, 2 Freem. 180, 1 Ch. Ca. 49; Evans *v.* Bicknell, 6 Ves. 191; Pickett *v.* Loggon, 14 Ves. 234.

[2] Taylor *v.* Shum, 1 B. & P. 21; Onslow *v.* Corrie, 2 Madd. 340; Fagg *v.* Dobie, 3 Y. & C. 103.

[3] Hughes *v.* Howard, 25 Beav. 575.

FRAUD BY AND UPON COMPANIES.

Fraud which consists in misrepresentation or concealment on the part of companies has been already considered; but there are other acts on the part of companies which are fraudulent in the contemplation of a court of equity.

The creditor of a company who has recovered judgment against the company may, unless in the case of companies within the Companies' Act, 1862,[1] proceed to execution at his pleasure against any particular shareholder;[2] but if a company enter into an agreement with one of its creditors that he shall recover judgment against the company, and take out execution against a particular shareholder, there is fraud, against which relief may be had in equity.[3] The rule that a partner cannot buy in a debt, and enforce it against his copartners applies equally as between shareholders in joint stock companies.[4]

A shareholder in a company acting *bonâ fide* may sell his shares to another person, or give him money to take the shares, if the transaction be open and not merely colorable; but if a shareholder gets rid of his shares by assigning them to a pauper, or to a person over whom he has entire control, in order to avoid paying his share of the debts of the company, and to throw them upon the other shareholders, the transaction is fraudulent.[5]

Where shares in a joint stock company have been issued fraudulently, a *bonâ fide* purchaser of these shares in the market, before any bill has been filed to impeach the transaction, is entitled, on a winding-up of the company, notwithstanding the fraud, and notwithstanding that he bought the shares at a very great discount, to prove on equal terms with

[1] 25 & 26 Vict. c. 89, §§ 85, 201.

[2] Green *v.* Nixon, 23 Beav. 530; Beck *v.* Dean, 3 Jur. N. S. 14.

[3] Taylor *v.* Hughes, 2 J. & L. 24; Fernihough *v.* Leader, 15 L. J. Ch. 458, 4 Ra. Ca. 373; Horn *v.* Kilkenny, &c. Railway Co., 1 K. & J. 399; Bargate *v.* Shortridge, 5 H. L. 297.

[4] Woodhams *v.* Anglo-Australian, &c. Co., 2 D. J. & S. 162.

[5] Slater's Case, 35 Beav. 393. See *Ex-parte* Garstin, 10 W. R. 457.

the other shareholders of the company who bought their shares at par; but this privilege does not extend to any person who purchased his shares after the filing of the bill, unless his vendor was a *bonâ fide* holder of the shares before bill filed, and the *onus* of proof that such was the case is upon him.[1]

FRAUD UPON THE MORTMAIN LAWS.

The court will relieve against a fraud on the Mortmain laws. The statute 9 Geo. II, cannot be evaded by a secret trust, and the heir may compel the devisee to disclose any promise which he may have made to the testator to devote the land to charity;[2] and such promise, if denied by the devisee, may be proved by evidence *aliunde*.[3] The trust, by whatever means established, invalidates the devise. This doctrine evidently assumes that the trust, if legal, would have been binding on the conscience of, and might have been enforced against, the devisee; and this ground failing, the rule does not apply: as where a testator, after devising lands by a will duly attested, declares a trust in favor of a charity by an unattested paper or by parol, the statute law, which affords to the devisee a valid defence against any claim on the part of the charity, of course equally defends him against the claim of the heir, founded on the charitable trust.[4] The case would be different, however, if the devisee had prevailed on the testator to give him the estate absolutely, under an assurance that the unattested paper was a sufficient declaration of trust for the charity,[5] or under a promise that if the estate were devised to him, he would perform the trust.[6]

[1] Barnard *v.* Bagshaw, 1 H. & M. 69.

[2] Boson *v.* Statham, 1 Ed. 508; Muckleston *v.* Brown, 6 Ves. 52; Stickland *v.* Aldridge, 9 Ves. 516; Paine *v.* Hull, 18 Ves. 475.

[3] Edwards *v.* Pike, 1 Ed. 267, 1 Cox, 17.

[4] Adlington *v* Cann, 3 Atk. 141; cit. 9 Ves. 519; Wallgrave *v.* Tebbs, 2 K. & J. 313; Lomax *v.* Ripley, 3 Sm. & G. 48.

[5] See Adlington *v.* Cann, 3 Atk. 152.

[6] Russell *v.* Jackson, 10 Ha. 204. See Jarman on Wills, vol. I, p. 213.

FRAUDS ON THE LAW OF FORFEITURE.

A court of equity will relieve against frauds on the law of forfeiture.

The crown coming in on the foot of an attainder has all the rights of the party forfeiting, and has the same equity to be relieved against conveyances on the ground of fraud as he would have. The crown, on a forfeiture, takes the estate, subject to all charges and incumbrances which would have bound the party forfeiting, and is bound, too, thereby, where there is no fraud, in respect of the crown. If, however, the attainted party has voluntarily and designedly made a grant or conveyance to encumber his estate, with a view to high treason, the crown, and those taking from it, would have a right to dispute that demand, and be delivered therefrom, as fraudulent.[1]

If a man gives an estate to A and his heirs, but in case he commits high treason, over to another, this is a void limitation, because it is an invasion of the laws of forfeiture.[2] So also a man may substitute another legatee or executor, if the first should die during the life of the testator, but he cannot extend it beyond the term of his own life.[3]

FRAUD UPON THE BANKRUPT LAWS.

The principle of the Bankrupt laws being the equal distribution of the property and effects of a bankrupt among his creditors,[4] acts which are done with the object of preventing an equal distribution of the property and effects of a bankrupt among his creditors are fraudulent within the meaning of those laws.[5] The assignment, accordingly, by a man of the whole of his estate and effects, or of the whole with a colorable excep-

[1] Duke of Bedford *v.* Coke, 2 Ves. 115.

[2] Carte *v.* Carte, 3 Atk. 180; Amb. 32.

[3] *Ib.*

[4] Worsley *v.* De Mattos, 1 Burr. 476, Woodhouse *v.* Murray, L. R. 2 Q. B. 637.

[5] Young *v.* Waud, 8 Exch. 234.

tion of part only, under such circumstances as necessarily to defeat or delay his creditors, is a fraud within the meaning of those laws, although there be no actual moral fraud.[1] An exception, however, has been grafted on the general principle. The assignment by a trader of his property and effects for a present advance of money is not necessarily a fraud on the Bankrupt laws, though the whole of his stock, present and future, is included in the conveyance. If the conveyance be made *bonâ fide* for the purpose of enabling him to carry on his business, it cannot be called a fraudulent act as tending to defeat or delay creditors,[2] although the property or effects have been sold or pledged for a sum less than their value. The assignment by a trader of all his property and effects for a present advance of part of their value is not necessarily a fraud on creditors under the Bankrupt laws. The advance may be the means of enabling him to go on with his trade, and so the transaction may be beneficial for the creditors. A *bonâ fide* sale of goods in a season of pressure by a trader for whatever ready money can be obtained is valid, though the price be small. The proportion which the sum raised bears to the value of the property sold or pledged, is a circumstance to be considered in determining whether the transaction is *bonâ fide* or not, but is not conclusive that it is fraudulent.[3] It is for the court or the jury to say whether, under all the circumstances of the case, the effect of the assignment is to delay or defeat creditors.[4] If there was in the minds of the parties the sinister object of defeating or delaying creditors, the advance of

[1] Hooper *v.* Smith, 1 W. Bl. 441, Siebert *v.* Spooner, 1 M. & W. 715; Stanger *v.* Wilkins, 19 Beav. 626; Smith *v.* Cannan, 2 E. & B. 35; *Ex-parte* Bland, 6 D. M. & G. 757; Graham *v.* Chapman, 12 C. B 85; Leake *v.* Young, 5 E. & B. 965; Smith *v.* Timms, 1 H. & C. 856; Young *v.* Fletcher, 3 H. & C. 742; Woodhouse *v.* Murray, L. R. 2 Q. B. 637.

[2] Bittlestone *v.* Cooke, 6 E. & B. 307; Bell *v.* Simpson, 2 H. & N. 410. See *Ex-parte* Wensley, 1 D. J. & S. 281; Mercer *v.* Peterson, L. R. 3 Exch. 104.

[3] Lee *v.* Hart, 11 Exch. 880; Bittlestone *v.* Cooke, 6 E. & B. 307, 309; Pennell *v.* Reynolds, 11 C B. N. S. 709; Shrubsole *v.* Sussams, 16 C. B. N. S. 453.

[4] *Ib.* Woodhouse *v.* Murray, L. R. 2 Q. B. 637.

even a substantial part of the value of the property at the time of the assignment would not make the transaction valid. But the court will not hold that a deed conveying property in consideration of a present advance which bears a substantial proportion to the value of the property, is invalid, unless it is satisfied that there exists an intention to defeat or delay, and consequently to defraud creditors; and that object must be the object not only of the bankrupt but also of the party who is dealing with him. A person dealing *bonâ fide* with the bankrupt would be safe. Unless he knows, or, from the very nature of the transaction, must be taken necessarily to have known, that the object was to defeat or delay creditors, the deed cannot be impeached.[1] A conveyance by a trader of all his property was held fraudulent upon creditors within the meaning of the bankruptcy laws, even though made in consideration of marriage, it being shown that the wife was cognisant of the embarrassed condition of the husband's affairs.[2]

There are authorities to show that when a conveyance is made by a trader of all his property and effects, and the conveyance is made in part for a bygone or pre-existing debt, the transaction is a fraud upon creditors within the meaning of the Bankrupt laws, upon the principle that in such case the trader does not get an equivalent.[3] But according to other authorities, the fact that the consideration for which the conveyance may be made is in part an old or pre-existing debt, is not *per se* a fraud upon creditors within the meaning of those laws, though the effect may be to stop the business of the trader.[4] The assignment by a man of all his property with a view to release and relieve the property from the charges already laid

[1] Pennell *v.* Reynolds, 11 C. B. N. S. 722; Fraser *v.* Levy, 6 H. & N. 16. See Re Colemere, L. R. 1 Ch. App. 128.

[2] Colombine *v.* Penhall, 1 Sm. & G. 228.

[3] Graham *v.* Chapman, 12 C. B. 85; Smith *v.* Cannan, 2 E. & B. 35; Laeon *v.* Liffen, 32 L. J. Ch. 316; Oriental Banking Co. *v.* Coleman, 3 Giff. 11; Goodricke *v.* Taylor, 2 D. J. & S. 135.

[4] Bell *v.* Simpson, 2 H. & N. 410.

on it, and not to pay a past debt only, is valid.[1] So also an assignment by a man of the whole of his property in consideration of a bill of exchange being taken up, is not an act of bankruptcy.[2] Nor is the assignment by a trader of all his property as security for an advance of money, which he afterwards applies in payment of existing debts, necessarily fraudulent within the meaning of the Bankrupt laws. In order to make such an assignment fraudulent, the lender must be aware that the borrower's object was to defeat or delay his creditors.[3]

An assignment by a man, not of the whole of his property and effects, but of his property and effects, with a real and substantial exception, is not a fraud within the meaning of the Bankrupt laws.[4] But the deed is invalid, although a substantial part of the property and effects of the assignor be not comprised in it, if the necessary consequence of it be to cause insolvency, or to defeat and delay creditors.[5] The rule applies with peculiar force, if the fact of his embarrassed circumstances be known, or must be necessarily taken to be known, by the assignee.[6]

Objections, however, to an assignment or other transaction, as being in fraud of the Bankrupt laws, are removed if it is founded on a legal obligation entered into *bonâ fide* for a good and valid consideration. Any legal obligation which would render an assignment unimpeachable, if made when the obligation was first incurred, will protect it if made afterwards.[7] Where money was lent on a verbal promise to give security, and a deed was executed, two days before bankruptcy, purport-

[1] Whitmore *v.* Claridge, 33 L. J. Q. B. 87.

[2] Mercer *v.* Peterson, L. R. 3 Exch. 104

[3] Re Colemere, L. R. 1 Ch. App. 128.

[4] Pennell *v.* Reynolds, 11 C. B. N. S. 709; Smith *v.* Timms, 1 H. & C. 849.

[5] Stanger *v.* Wilkins, 19 Beav. 626; Smith *v.* Cannan, 2 E. & B. 45; *Ex-parte* Bland, 6 D. M. & G. 757; Graham *v.* Chapman, 12 C. B. 103; Hale *v.* Allnutt, 18 C. B. 526; Young *v.* Waud, 8 Exch. 221; *Ex-parte* Wensley, 1 D. J. & S. 281; Goodricke *v.* Taylor, 2 D. J. & S. 135.

[6] *Ex-parte* Bailey, 3 D. M. & G. 546; Young *v.* Fletcher, 3 H. & C. 732. See Leake *v.* Young, 5 E. & B. 965.

[7] Harris *v.* Rickett, 4 H. & N. 1.

ing to be an absolute assignment to the creditor of the equity of redemption in some property, it was held that the promise was sufficient to support the deed.[1] So, also, where a marriage is solemnized upon the faith of a former *bonâ fide* contract of marriage, it seems the settlement will be maintained, even though at the time of the solemnization the husband may be insolvent within the knowledge of the wife, if such knowledge is not shown to have existed at the time of the contract,[2] provided no act of bankruptcy has been actually committed at the date of the marriage with the knowledge of the wife.[3]

Any legal obligation presently to assign which is not of the assignor's own creation will excuse an assignment so far that it shall not be fraudulent within the meaning of the Bankrupt laws.[4] If the obligation be his own creation, as if incurred by his own contract, or upon his undertaking, then the limitation must be added that it is such an obligation as he might without fraud have incurred.[5]

A debtor may at common law give one creditor a preference over another;[6] but there is fraud against the Bankrupt laws, if a man in contemplation of bankruptcy gives one creditor a perference over another. In order to constitute a fraudulent preference, the transaction must not only be in contemplation of bankruptcy, but it must be purely voluntary.[7] If the circumstances of the party who makes the payment or executes the assignment, are at the time of the payment, or of the execution of the assignment, to his knowledge in such a situation, that he must reasonably expect bankruptcy to be the necessary consequence of his act, the payment or the assignment must be taken to have been made in contemplation of

[1] Morris *v.* Venables, 15 W. R. 2.
[2] Fraser *v.* Thompson, 5 Jur. N. S. 669; 4 D. & J. 659.
[3] *Ib.* See Colombine *v.* Penhall, 1 Sm. & G. 228, *supra*, p. 202.
[4] Payne *v.* Hornby, 25 Beav. 280.
[5] Hutton *v.* Cruttwell, 1 E. & B. 15.
[6] *Supra*, pp. 212, 213.
[7] Brown *v.* Kempton, 19 L. J. C. P. 170; Shrubsole *v.* Sussams, 16 C. B. N. S. 459.

bankruptcy.[1] There is fraudulent preference, if the intent be to give preference in the event of bankruptcy.[2]

It was formerly supposed that, in order to prevent a transaction being void as a fraudulent preference, it was necessary to show something like coercion or pressure on the part of the creditor, and a reluctant yielding by the debtor; but the only question in cases of the sort is whether the act is voluntary on the part of the debtor. Pressure is not necessary to prevent a payment or assignment from being a fraudulent preference. It is sufficient that the payment or assignment is not the spontaneous act of the debtor.[3] If the payment or assignment originates with, or is simply by the act and will of the debtor, there is a fraudulent preference; but, if the creditor demands payment, pressure is not necessary on his part to take it out of the class of voluntary acts. A mere *bonâ fide* demand by the creditor, without any pressure, is sufficient to support a payment or transaction made in consequence.[4] A request by a surety that the money for the payment of which he is ultimately responsible may be paid over by the debtor to the creditor, prevents such payment by the debtor from being a voluntary payment, just as much as a request by the creditor himself.[5]

It is not, however, enough to remove the objection of fraudulent preference, that a demand for payment should be made. It must appear that the demand operated on the mind of the debtor in inducing him to make the payment.[6] A demand for payment will not of itself legalize the payment, if the debtor was uninfluenced thereby, and the payment was

[1] Gibbins *v.* Phillips, 7 B. & C. 529; Flook *v.* Jones, 4 Bing. 20; Aldred *v.* Constable, 4 Q. B. 674; Johnson *v.* Fesemeyer, 3 D. & J. 24; *Ex-parte* Wensley, 1 D. J. & S. 281.

[2] Brown *v.* Kempton, 19 L. J. C. P. 169.

[3] Johnson *v.* Fesemeyer, 3 D. & J. 24.

[4] Mogg *v.* Baker, 4 M. & W. 348; Strachan *v.* Barton, 11 Exch. 647; Brown *v.* Kempton, 19 L. J. C. P. 170; Johnson *v.* Fesemeyer, 3 D. & J. 24; Edwards *v.* Glyn, 2 El. & El. 43.

[5] Edwards *v.* Glyn, 2 El. & El. 47.

[6] Cook *v.* Pritchard, 6 Sc. N. R. 34; Brown *v.* Kempton, 19 L. J. C. P. 169.

made voluntarily by the debtor, and with a view to prejudice his other creditors.[1]

Other circumstances, besides a demand for payment on the part of the creditor, may rebut the presumption of fraudulent preference on the part of the debtor. Although the transaction is apparently voluntary, if the effect of the evidence is to show that the desire to give a fraudulent preference was not the motive operating on the debtor in handing over his assets to the particular debtor, the transaction is valid.[2] If the debtor, though he was aware that bankruptcy was unavoidable, and though no application was made for payment, has paid the debt simply in discharge of an obligation he had entered into to pay it on a given day, without any view of giving a preference to the particular creditor at the expense of the rest, the payment would not be a fraudulent preference within the meaning of the Bankrupt laws.[3]

The knowledge of the creditor preferred, or his privity to the circumstances, is not to be taken into consideration in estimating whether a transaction is, or is not, a fraudulent preference. If it appear that a demand was made by the creditor, it is immaterial that he may have been aware of the insolvency of the debtor.[4]

If property be granted to a man defeasible on his bankruptcy, the grant is good, if made by a person other than the bankrupt, and if the condition is express.[5] But the law is clearly settled that no man possessed of property can reserve that property to himself, until he shall become bankrupt, and then provide that in the event of bankruptcy it shall pass to another, and not to his creditors.[6] A covenant or bond by a

[1] Cook *v.* Rogers, 7 Bing. 438.
[2] Bills *v.* Smith, 6 B. & S. 321.
[3] *Ib.* Hunt *v.* Mortimer, 10 B. & C. 44.
[4] Davison *v.* Robinson, 3 Jur. N. S. 791.
[5] Roe *v.* Galliers, 2 T. R. 133; Doe *v.* Bevan, 3 M. & S. 353; Dommett *v.* Bedford, 3 Ves. 149, 6 T. R. 684; Seymour *v.* Lucas, 29 L. J. Ch. 841; Griffith and Holm. Bank. 277.
[6] Higinbotham *v.* Holme, 19 Ves. 88;

man to pay moneys upon the contingency of his bankruptcy, even though given in consideration of marriage, is a fraud upon the Bankrupt laws, and cannot be upheld,[1] except as far as the value of the wife's fortune may extend.[2] If the court can find a definite sum which can be appropriated as the wife's property, the covenant will to that extent be supported.[3] The fortune of a wife may be settled on her husband till he shall become bankrupt, or make a composition with his creditors, and then to her separate use.[4]

Assignments by a trader of all his property and effects in trust for all his creditors were, under the old Bankrupt laws, held void;[5] but they were protected to a certain degree, and under certain conditions, by the Bankruptcy Act, 1849,[6] and are still further protected by the Bankruptcy Act, 1861.[7] By the 192d section of the latter Act, trust deeds for the benefit of creditors, composition and inspectorship deeds are binding on all the creditors of a certain debtor, if certain specified conditions are complied with. The power, however, given by the clause enabling the majority of creditors to bind the non-assenting minority, must be exercised *bonâ fide* for the benefit of all the creditors. It is necessary, in order to make a deed of this description binding, that it should be free from all taint of fraud. If there is a fraudulent bargain for the benefit of some creditors, or if the majority of creditors are induced by friendly feelings towards the debtor to accept a composition greatly disproportioned to the assets, the court will hold the deed not binding on the non-assenting creditors. But if the

Higginson *v.* Kelly, 1 Ba. & Be. 255; *Re* Casey's Trusts, 4 Ir. Ch. 247; Whitmore *v.* Mason, 2 J. & H. 212. See Holmes *v.* Penney, 3 K. & J. 102.

[1] *Ex-parte* Hill, 1 Cox, 300; *Ex-parte* Cooke, 8 Ves. 353; *Ex-parte* Murphy, 1 Sch. & Lef. 48; Higinbotham *v.* Holme, 19 Ves. 88; Higginson *v.* Kelly, 1 Ba. & Be. 251.

[2] Higginson *v.* Kelly, 1 Ba. & Be. 255; Lester *v.* Garland, 5 Sim. 205; Whitmore *v.* Mason, 2 J. & H. 204.

[3] *Ib.*

[4] Lester *v.* Garland, 5 Sim. 222; Sharp *v.* Cosseratt, 20 Beav. 470.

[5] Griffith and Holm. on Bank. 120.

[6] *Ib.* 987.

[7] *Ib.* 1002.

assenting majority appear to have exercised their discretion *bonâ fide* for the benefit of the creditors, the court will not review the *quantum* of the composition.[1] There is fraud upon the clause, if a man having no assets professes to assign all his property to fictitious creditors.[2]

FRAUD UPON RESTRAINING STATUTES, ETC.

In addition to those already enumerated, there are other frauds upon statutes or acts of Parliament against which relief may be had in equity: * such as, fraud upon the restraining statutes;[3] fraud upon the registry acts;[4] fraud upon a private act of Parliament;[5] and fraud on the revenue laws.[6]

FRAUD IN AWARDS.

Courts of equity have from a very early period had jurisdiction to set aside awards on the ground of fraud,[7] and still entertain the jurisdiction, except where it is excluded by statute.[8] †

[1] *Ex-parte* Cowen, L. R. 2 Ch. App. 563.
[2] *Re* Clunn, 12 W. R. 1093.
[3] Dean and Chapter of Windsor *v.* Penvin, Moor. 789.
[4] Curtis *v.* Perry, 6 Ves. 739; Osborne *v.* Williams, 18 Ves. 379; Battersby *v.* Smyth, 3 Madd. 110.
[5] Howard *v.* Earl of Shrewsbury, L. R. 2 Ch. App. 772.
[6] Evans *v.* Richardson, 3 Mer. 469.
[7] Greenhill v. Church, 3 Rep. Ch. 49; Brown *v.* Brown, 1 Vern. 156; Earl *v.* Stocker, 2 Vern. 251; Burton *v.* Knight, *ib.* 514.
[8] Smith *v.* Whitmore, 1 H. & M. 576, 2 D. J. & S. 297.

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* Whatever is done in fraud of a law, is done in violation of it. Lee *v.* Lee, 8 Pet. 44.

† The jurisdiction of Chancery over judgments on awards is confined to those cases where a court of equity is authorized to examine into and decree upon the judgment of a court of common law, rendered upon the verdict of a jury. There may be certain other cases where, from fraud, corruption, or misbehavior, it may be necessary to make the arbitrators parties in equity, in order to obtain a discovery, and in which an extension of the jurisdiction of a court of equity beyond this limit may be allowed. Waples *v.* Waples, 1 Harring. 392; Emerson *v.* Udall, 13 Vt. 472.

In cases where the submission to arbitration was by agreement between the parties, the only mode of obtaining relief formerly against an award which had been obtained under circumstances of fraud and corruption on the part of the arbitrator, was by bill in equity. But if the agreement or submission to arbitration be in writing, and contain a proviso that it may be made a rule of court, the case is now governed by stat. 9 & 10 Will. III, c. 15, and the jurisdiction of equity is excluded.[1] A court of equity has no jurisdiction, even on the ground of fraud, if a submission has been made a rule of a court of common law under the statute.[2]

If there be a proviso in the agreement or submission to arbitration enabling the parties to make it a rule of court, it is immaterial that it may not have been actually made a rule of court until after the award has been made, or until after bill filed.[3] The Court of Chancery is one of the courts of record invested with summary jurisdiction under the statute.[4] If there was no proviso in the agreement or submission to arbitration enabling the parties to make it a rule of court, the jurisdiction was, until a recent period, exclusive in equity.[5] But by the seventeenth clause of the Common Law Procedure Act, 17 & 18 Vict. c. 125, it is declared that every agreement or submission to arbitration by consent, whether by deed or instrument in writing, may be made a rule of a court of common law, unless a contrary intention appears. The mere existence, however, of a power to make an agreement or submission to arbitration a rule of court, is not tantamount to an agreement that it shall be made so, nor does it of itself, and independently of agreement, exclude the ordinary jurisdiction

[1] Heming *v.* Swinerton, 2 Ph. 79; Smith *v.* Whitmore, 1 H. & M. 576, 2 D. J. & S. 297.

[2] Auriol *v.* Smith, T. & R. 121; Dawson *v.* Sadler, 1 Sim. & St. 537.

[3] Nichols *v.* Roe, 3 M. & K. 439; Heming *v.* Swinerton, 2 Ph. 79.

[4] Heming *v.* Swinerton, 2 Ph. 79.

[5] —— *v.* Mills, 17 Ves. 419; Goodman *v.* Sayers, 2 J. & W. 249.

of the court.[1] If there be no proviso that it may be made a rule of court, it does not become a rule of court under the Common Law Procedure Act, unless it be actually made a rule of court.[2]

Before the statute 9 & 10 Will. III, c. 15, courts of law were in the practice, upon consent of parties, of referring causes to arbitration, either by rule of court, or by order of a judge, or at *nisi prius*, and of making the submission at the same time a rule of court. In such cases courts of equity exercised a concurrent jurisdiction over the award made upon the reference with courts of law, and the statute of William does not appear to have interfered with the jurisdiction.[3] Nor has the jurisdiction been excluded by the enlarged powers conferred on courts of common law by the Common Law Procedure Act, 17 & 18 Vict. c. 125.[4] It is, however, the rule of the court not to interfere with an award made under a reference at law, unless there be something in the circumstances of the case to show or to make it appear that a court of law has not full power and jurisdiction to grant full and adequate relief. The fact that a court of common law has a power of remitting the award for reconsideration, has weight with the Court of Chancery when called upon to interfere.[5]

There is fraud in an award if it be obtained through corruption or partiality on the part of the arbitrator.[6] * In a case

[1] Smith *v.* Whitmore, 2 D. J. & S. 308; *per* Turner, L. J.

[2] *Ib.*

[3] Lord Lonsdale *v.* Littledale, 2 Ves. Jr. 451; Nichols *v.* Chalie, 14 Ves. 267; Nicholls *v.* Roe, 3 M. & K. 439; Chuck *v.* Cremer, 2 Ph. 477; Harding *v.* Wickham, 2 J. & H. 676.

[4] §§ 3–16.

[5] Londonderry and Enniskillen Railway Co. *v.* Leishman, 12 Beav. 423; Harding *v.* Wickham, 2 J. & H. 676.

[6] Lord Lonsdale *v.* Littledale, 2 Ves. Jr. 453; Lingood *v.* Croucher, 2 Atk. 396.

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* It is misbehavior in arbitrators to repose undue confidence in the unproved statements of one of the parties. Lee *v.* Patillo, 4 Leigh, 486.

For misbehavior in the arbitrators, by refusing to hear material

where arbitrators had, either by force or fraud, excluded a co-arbitrator, or either of the parties, from their meetings, it was held to furnish such a presumption of corruption as to be a sufficient ground for setting aside the award.[1] So, also, it is against good faith for a person appointed arbitrator to consider himself as agent of the person appointing him,[2] or to buy up the unsustained claims of any of the parties to the reference.[3] So, also, there is fraud if the award has been obtained by fraud or concealment of material circumstances on the part of one of the parties, so as to mislead the arbitrator. If either party be guilty of fraudulent concealment of matters which he ought to have declared, or if he wilfully mislead or deceive the arbitrator, the award may be set aside.[4] An award will not, however, be set aside on the ground that the arbitrator has been mislead by the evidence of a witness who might have been cross-examined.[5] There is also fraud to set aside an award, if the award be obtained by undue means; as, for instance, if the witnesses have been examined in the absence of the parties;[6]* or if the award has been made clandes-

[1] Burton *v.* Knight, 2 Vern. 514. See Haigh *v.* Haigh, 3 D. F. & J. 159.
[2] Calcraft *v.* Roebuck, 1 Ves. Jr. 226.
[3] Blennerhasset *v.* Day, 2 Ba. & Be. 116.
[4] South Sea Co. *v.* Bumpstead, Vin. Ab. Arbitr (1 a) 39, 2 Eq. Ca. Ab. 80; Ives *v.* Metcalfe, 1 Atk. 64; Gartside *v.* Gartside, 3 Anst. 735.
[5] Pilmore *v.* Hood, 8 Scott, 180.
[6] *Re* Plews *v.* Middleton, 6 Q. B. 845. See Haigh *v.* Haigh, 3 D. F. & J. 159.

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testimony, an award will be set aside. Van Cortland *v.* Underhill, 17 Johns. 405; s. c. 2 Johns. Ch. 339.

An award estimating damages or the value of property will not be set aside in equity, unless the estimate is so enormously disproportioned to the case proved as to strike every one that there must have been corruption and partiality. Rand *v.* Redington, 13 N. H. 72; Bumpass *v.* Webb, 4 Port. 65; Beverly *v.* Rennolds, Wythe, 105; Van Cortland *v.* Underhill, 17 Johns. 405; s. c. 2 Johns. Ch. 339.

* Pierce *v.* Perkins, 2 Dev. Eq. 250; Emery *v.* Owings, 7 Gill, 488; Knowlton *v.* Nickles, 29 Barb. 465.

tinely without hearing each party;[1] * or if the award has been made by one arbitrator apart from the others;[2] or if interviews have taken place between the arbitrator and one party in the absence of the others.[3] So, also, the existence of any ground calculated to bias the mind of the arbitrator, unknown to either of the parties, is sufficient for the interference of the court;[4] or if one of the parties has not been allowed a proper opportunity of discussing his case.[5] If interviews have taken place between the arbitrator and one of the parties, in the absence of the other, similar misconduct on the part of the person applying will not prevent the court from setting aside

[1] Ives *v.* Medcalfe, 1 Atk. 64; Harding *v.* Wickham, 2 J. & H. 676. See Smith *v.* Whitmore, 1 H. & M. 576.
[2] *Re* Plews *v.* Middleton, 6 Q. B. 852.
[3] Harvey *v.* Shelton, 7 Beav. 455.
[4] Kemp *v.* Rose, 1 Giff. 258.
[5] Spettique *v.* Carpenter, 3 P. Wms. 361.

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* Peters *v.* Newkirk, 6 Cow. 103; Lutz *v.* Linthicum, 8 Pet. 178; Jordan *v.* Hyatt, 3 Barb. 634; Rigden *v.* Martin, 6 H. & J. 403; Walker *v.* City Council, 1 Bailey's Ch. 443.

Evidence cannot be introduced without giving the opposite party an opportunity for cross-examination. Shinnis *v.* Coil, 1 McCord's Ch. 478.

Merely recalling a witness who had been examined, for the purpose of explaining his testimony, in the absence of both parties, is not a sufficient ground. Herrick *v.* Blair, 1 Johns. Ch. 101.

The mere fact that a party offered and prevailed before the arbitrators, upon a groundless claim, is no ground for charging him with fraud. The mere fact that he considered it one of doubtful equity, or even honestly believed that it was not well founded, if all the facts known to him were fairly laid before the arbitrators, is no such fraud as will justify a court of equity in interfering. He must, either by the suggestion of falsehood, or the suppression of truth, have presented to the arbitrators a state of facts in regard to the merits of the claim which were fictitious, and which he at the time believed to be such. Emerson *v.* Udall, 13 Vt. 477; Bulkley *v.* Starr, 2 Day, 552.

The discovery of new evidence, or that the case might be put on a different footing by new evidence, or that a more perfect rule might have been adopted, are no grounds for an application to Chancery to have an award set aside. Allen *v.* Rauney, 1 Ct. 569.

New evidence may be so decisive, and have been so suppressed by the adverse party, that an award ought to be relieved against in equity. Lankton *v.* Scott, Kirby, 356.

the award, for the matter concerns the due administration of justice.[1]

Equity will not give relief against an award, if the conduct of the party making the application has been such as to destroy his right to resort to the court for relief.[2] An agreement for reference, accordingly, cannot be set aside as obtained by undue pressure, if the party objecting has attended the reference, and taken the chance of an award in his favor.[3] Nor can relief be had against an award when there has been any laches on the part of the person making the application.[4] Similar misconduct, however, to that complained of on the part of the person making the application, will not prevent the court from setting aside an award, if the award has been obtained by undue means.[5]

FRAUD IN JUDGMENTS.

A judgment or decree obtained by fraud upon a court, binds not such court or any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding.[6]* "Fraud," said De Grey, C. J., "is an extrinsic, collateral act, which vitiates the most

[1] Harvey *v.* Shelton, 7 Beav. 455.

[2] Smith *v.* Whitmore, 1 H. & M. 576, 2 D. J. & S. 297.

[3] Ormes *v.* Beadel, 2 Giff. 166, 2 D. F. & J. 333; *Ex-parte* Wyld, 2 D. F. & J. 642.

[4] Jones *v.* Bennett, 1 Bro. P. C. 528. See Eads *v.* Williams, 4 D. M. & G. 674; Nichols *v.* Hancock, 7 D. M. & G. 300.

[5] Harvey *v.* Shelton, 7 Beav. 455.

[6] Philippson *v.* Lord Egremont, 6 Q. B. 582; Lord Bandon *v.* Becher, 3 Cl. & Fin. 510; Sheddon *v.* Patrick, 1 Macq. 535; Reg. *v.* Saddlers' Co., 10 H. L. 431, *per* Willes, J. See Tommey *v.* White, 4 H. L. 313.

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* Webster *v.* Reid, 11 How. 437; Carpenter *v.* Hart, 5 Cal. 406.

Judgments, whether confessed or rendered upon a verdict, may be attacked collaterally as fraudulent against creditors. Clark *v.* Douglass, 62 Penn. 408.

A judgment may be attacked collaterally for some matter arising subsequently to the entry of it, as payment or a release, which would show that it was kept on foot fraudulently. Campbell *v.* Sloan, 62 Penn. 481.

solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical and temporal."[1]* In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest court of judicature in the realm, but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.[2] Whether an innocent party would be allowed to prove in one court that a judgment against him in another court was obtained by fraud, is a question not equally clear, as it would be in his power to apply directly to the court which pronounced it to vacate it.[3] But, however this point may be ultimately determined, thus much is evident, that a guilty party would not be permitted to defeat a judgment by showing that, in obtaining it, he had practiced an impositition on the court, for it would be an outrage on justice and common sense if a person could thus avoid the consequences of his own fraudulent conduct.[4]

FRAUD UPON THE CROWN.

A conveyance executed in fraud of proceedings under an outlawry, is a fraud upon the Crown, and will be set aside.[5]

[1] Rex *v.* Duchess of Kingston, 20 How. St. Tr. 544, 2 Smith's L. C. 687. See Brownsword *v.* Edwards, 2 Ves. 246; Meddowcroft *v.* Huguenin, 4 Moo. P. C. 386; Perry *v.* Meddowcroft, 10 Beav. 122; Harrison *v.* Mayor &c. of Southampton, 4 D. M. & G. 137.

[2] Shedden *v.* Patrick, 1 Macq 535.

[3] Prudham *v.* Philipps, 2 Ambl. 763; 20 How. St. Tr. 479, 481; Rex *v.* Duchess of Kingston, 20 How. St. Tr. 544.

[4] Prudham *v.* Philipps, 2 Amb. 763, 20 How. St. Tr. 479; Doe *v.* Roberts, 2 B. & Ald. 367; Bessey *v.* Windham, 6 Q. B. 166.

[5] Att.-Gen. *v.* Richards, 1 Ph. 383.

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* Gill *v.* Carter, 6 J. J. Marsh. 484; Hall *v.* Hall, 1 Gill. 391; Wilson *v.* Watts, 9 Md. 356.

With any fraudulent conduct of parties in obtaining a judgment, or in attempting to avail themselves of it, a court of equity can regularly take cognizance. The true and intrinsic character of proceedings, as well in courts of law as *in pais*, is alike subject to the scrutiny of a court of equity, which will probe, and either sustain or annul them, according to

FRAUD UPON COURTS OF COMPETENT JURISDICTION.

A court of equity will give assistance to enforce the judgments, decrees, or sentences of other courts of competent and lawful civil jurisdiction, when the execution of such judgments, decrees, and sentences is defeated or obstructed by fraudulent contrivances.[1]

A voluntary settlement, accordingly, of real and personal estate, made by a man who was defendant in a suit in the Ecclesiastical Court, with the intent of withdrawing his property from the process of that court, was set aside.[2] Although the deed may have been executed before any right was declared, or any order for payment of money was made, yet if it appear that the deed was executed for the purpose of defeating the right which the defendant knew the plaintiff was entitled to establish, it will be considered to have been executed with the view and intention of defrauding him.[3]

FRAUD UPON THE LEGISLATURE.

In Vauxhall Bridge Co. *v.* Earl Spencer,[4]* it was held that an agreement between a land-owner and a company, that, in the event of his not opposing an application to Parliament, the land-owner should receive a sum of money, is a fraud upon the legislature if concealed from Parliament, and is, therefore, void upon grounds of public policy. But the prin-

[1] Blenkinsopp *v.* Blenkinsopp, 12 Beav. 586.
[2] *Ib.* 1 D. M. & G. 500.
[3] 1 D. M. & G. 500.
[4] 2 Madd. 306; S. C. Jac. 64.

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their real character, and as the ends of justice may require. Byers *v.* Surget, 19 How. 303; s. c. 1 Hemp. 715; Williams *v.* Fowler, 2 J. J. Marsh. 405; Griffin *v.* Sketo, 30 Geo. 300.

* Misrepresentation and concealment employed in obtaining an act of the legislature, are ground for a court of equity to give relief by depriving a party of such unjust advantage obtained thereby. State *v.* Reed, 4 H. & McH. 6; Williamson *v.* Williamson, 3 Smed. & Mar. 715.

ciple upon which that case was founded is open to much question. The better opinion would seem to be, that there is no fraud upon the legislature unless the agreement is one which the parties are bound to communicate. There may be cases in which an agreement of the sort should be communicated to the legislature, but there can be no doubt that in ordinary cases it is open to parties to enter into such an agreement, and that there is no obligation incumbent on them to communicate it to the legislature.[1] The question whether such an agreement is binding on the company after incorporation, is a very different one.

SECTION VI.—HOW THE RIGHT TO IMPEACH A TRANSACTION ON THE GROUND OF FRAUD MAY BE LOST.

Transactions, although impeachable in equity at the time of inception, and for some time afterwards, on the ground of fraud, may become unimpeachable by a subsequent confirmation, by acquiescence, or by the mere lapse of time.

CONFIRMATION.

In order that an act may have any effect or validity as a confirmation, it must clearly appear that the party confirming was fully apprised of his right to impeach the transaction, and acted freely, deliberately, and advisedly, with the intention of confirming a transaction which he knew, or might, or ought, with reasonable or proper diligence, to have known to be

[1] Simpson *v.* Lord Howden, 10 A. & E. 793, 9 Cl. & Fin. 61; Taylor, *v.* Chichester, &c., Railway Co., L. R. 2 Exch. 356. See as to fraud in obtaining a local act of Parliament, Mangles *v.* Grand Dock Colliery Co., 10 Sim. 519.

impeachable.* If his right to impeach the transaction be concealed from him, or a free disclosure be not made to him of every circumstance which it is material for him to know, or if the act takes place under pressure or constraint, or by the exercise of undue influence, or under the delusive opinion that the original transaction is binding on him, or if it be merely a continuation of the original transaction, the confirmation operates as nothing.[1]† Confirmation may be by will as well as

[1] Cann *v.* Cann, 1 P. Wms. 727; Cole *v.* Gibbons, 3 P. Wms. 290; Crowe *v.* Ballard, 3 Bro. C. C. 119, 2 Cox, 253; Chesterfield *v.* Jansen, 2 Ves. 125; Walker *v.* Symonds, 3 Sw. 1; Murray *v.* Palmer, 2 Sch. & Lef. 486; Morse *v.* Royal, 12 Ves. 355; Purcell *v.* Macnamara, 14 Ves. 91; Gowland *v.* De Faria, 17 Ves. 20; Wood *v.* Downes, 18 Ves. 128; Say *v.* Barwick, 1 V. & B. 195; Roche *v.* O'Brien, 1 B. & B. 338, 340; Dunbar *v.* Treddennick, 2 B. & B. 317; Molony *v.* L'Estrange, Beat. 406; Cockerell *v.* Cholmondeley, 1 R. & M. 425; Wedderburn *v.* Wedderburn, 2 Keen, 722; De Montmorency *v.* Devereux, 7 Cl. & Fin. 188; Mulhallen *v.* Marum, 3 Dr. & War. 317; Salmon *v.* Cutts, 4 Deg. & S. 132; Stump *v.* Gaby, 2 D. M. & G. 623; Roberts *v.* Tunstall, 4 Ha. 257; Cockell *v.* Taylor, 15 Beav. 125; Waters *v.* Thorn, 22 Beav. 547; Savery *v.* King, 5 H. L. 627; Athenæum Life Society *v.* Pooley, 3 D. & J. 299; Smith *v.* Kay, 7 H. L. 750; Wall *v.* Cockerell, 10 H. L. 229; Potts *v.* Surr, 34 Beav. 543.

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* Confirmation and ratification imply knowledge of a defect in the act to be confirmed and of the right to reject or ratify it. Cumberland Coal Co. *v.* Sherman, 20 Md. 117.

The party must be aware that the act he is doing will have the effect to confirm the transaction. Cherry *v.* Newsom, 3 Yerg. 369.

Ratification is the adoption of a previously formed contract, notwithstanding a vice that rendered it relatively void; and by the very nature of the act of ratification, confirmation, or affirmance, the party confirming becomes a party to the contract; he that was not bound becomes bound by it, and entitled to all the benefits of it. He accepts the consideration of the contract as a sufficient consideration for adopting it, and usually this is quite enough to support the ratification. Pearsoll *v.* Chapin, 44 Penn. 9.

† Hoffman Steam Coal Co. *v.* Cumberland Coal Co. 16 Md. 456; Cumberland Coal Co. *v.* Sherman, 20 Md. 117; Williams *v.* Reed, 3 Mason, 405; Butler *v.* Haskell, 4 Dessau. 651; Cumberland Coal Co. *v.* Sherman, 30 Barb. 533; McCormick *v.* Malin, 5 Blackf. 509; Brodduc *v.* Call, 3 Call, 546; Boyd *v.* Hawkins, 2 Dev. Eq. 195; Rainsford *v.* Rainsford, Spears' Ch. 385.

Confirmation must be a solemn and deliberate act. When the original transaction is infected with fraud, the confirmation of it is so inconsistent

by deed.[1] If an independent legal adviser be employed, it will be assumed that he had satisfied himself before approving of the transaction, that it was for the benefit of his client to confirm it.[2]

RELEASE.

The same requisites which are necessary to render a confirmation valid, are necessary to render a release valid.[3]*

ACQUIESCENCE.

It is not necessary, in order to render a transaction unimpeachable, that any positive act of confirmation or release should take place. It is enough, if proof can be given of a fixed and unbiassed determination not to impeach the transaction. This may be proved, either by acts evidencing acqui-

[1] Stump *v.* Gaby, 2 D. M. & G. 623. See Waters *v.* Thom, 22 Beav. 547.

[2] Stanes *v.* Parker, 9 Beav. 388; De Montmorency *v.* Devereux, 7 Cl. & Finn. 188; Aspland *v.* Watte, 20 Beav. 474.

[3] Lloyd *v.* Attwood, 3 D. & J. 614; Spackman's Case, 34 L. J. Ch. 329; Farrant *v.* Blanchford, 1 D. J. & S. 119; Aveline *v.* Melhuish, 2 D. J. & S. 289. See Salkeld *v.* Vernon, 1 Eden, 64; Broderick *v.* Broderick, 1 P. W. 239; Cocking *v.* Pratt, 1 Ves. 400; Heron *v.* Heron, 2 Atk. 160; Pusey *v.* Desbouverie, 3 P. Wms. 315; Steadman *v.* Palling, 3 Atk. 423; Bowles *v.* Stuart, 1 Sch. & Lef. 209; O'Neill *v.* Hamill, Beat. 618; Williams *v.* Smith, 7 L. J. Ch. 129; Wedderburn *v.* Wedderburn, 2 Keen, 728, 4 M. & C. 41; Millar *v.* Craig, 6 Beav. 433; Stanes *v.* Parker, 9 Beav. 385; Todd *v.* Wilson, *ib.* 486; Lindo *v.* Lindo, 1 Beav. 496; Duke of Leeds, *v.* Amherst, 2 Ph. 117; Thornber *v.* Sheard, 12 Beav. 589; Parker *v.* Bloxam, 20 Beav. 295; Aspland *v.* Watte, *ib.* 480; Eyre *v.* Burmester, 10 H. L. 106; Skilbeck *v.* Hilton, 2 L. R. Eq. 587.

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with justice, and so likely to be accompanied with imposition, that the courts watch it with the utmost strictness, and do not allow it to stand but on the clearest evidence. Cumberland Coal Co. *v.* Sherman, 20 Md. 117.

The legal title is supreme until attacked. If the injured party ratifies the original transaction, the abandonment of his equitable claims removes all doubt from the legal title, and it is as if suspicion or embarrassment had never attached to it. Comstock *v.* Ames, 3 Keyes, 357.

* Michoud *v.* Girod, 4 How. 503; Bradley *v.* Chase, 22 Me. 511; Parson *v.* Hughes, 9 Paige, 591.

escence, or by the mere lapse of time during which the transaction has been allowed to stand.[1]

Acquiescence or delay for a length of time after a man is in a situation to enforce a right, and with a full knowledge of facts, is, in equity, cogent evidence of a waiver and abandonment of the right.[2] * If a voidable contract, or other transaction, is voluntarily acted on, with a knowledge of all the facts, in the hope that it may turn out to the advantage of a party who might have avoided it, he may not avoid it when, after abiding that event, it has turned out to his disadvantage.[3]†

[1] Vanderplank *v.* King, 8 D. M. & G. 133.

[2] Duke of Leeds *v.* Lord Amherst, 2 Ph. 117, 123; Life Association of Scotland *v.* Siddall, 3 D. F. & J. 73; Skottowe *v.* Williams, *ib.* 535.

[3] Ormes *v.* Beadel, 2 D. F. & J. 336, *per* Lord Campbell.

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* Crozier *v.* Acer, 7 Paige, 137; Davis *v.* James, 4 J. J. Marsh. 81; Pollard *v.* Rogers, 4 Call, 239; Moffatt *v.* Winslow, 7 Paige, 124; Saddler *v.* Robinson, 2 Stew. 520; Ayres *v.* Mitchell, 3 Smed. & Mar. 383; Moore *v.* Reed, 2 Ired. Eq. 580; McNaughton *v.* Partridge, 11 Ohio, 223; Knuckolls *v.* Lea, 10 Humph. 577; Dougherty *v.* Dougherty, 3 Halst. Ch. 627.

† Bruce *v.* Davenport, 3 Keyes, 472; Collier *v.* Thompson, 4 Mon. 81; Finley *v.* Lynch, 2 Bibb, 566; De Armand *v.* Philips, Walker's Ch. 186; Blydenburch *v.* Welsh, 1 Bald. 331; Edwards *v.* Roberts, 7 Smed. & Mar. 544; Railroad Co. *v.* Rowe, 24 Wend. 74.

A vendor by bringing suit and recovering judgment for the purchase money, ratifies and confirms the sale. Nelson *v.* Carrington, 4 Munf. 332; Sanger *v.* Wood, 3 Johns. Ch. 416; Pettus *v.* Smith, 4 Rich. Eq. 197.

The matter of waiver is not a conclusion of law from any particular incident, but a conclusion of fact deducible from all the acts of a party as evidence of his intention. Crawley *v.* Timberlake, 2 Ired. Eq. 460.

A party is bound to be prompt in communicating the fraud when discovered, and consistent in his notice to the opposite party of the use he intends to make of it. Carroll *v.* Rice, Walker's Ch. 373; Disbrow *v.* Jones, Harring. Ch. 102; Street *v.* Dow, Harring. Ch. 427; Wingate *v.* King, 10 Shep. 95; Cain *v.* Guthrie, 8 Blackf. 409; Alexander *v.* Ultez, 7 Ired. Eq. 242; Fratt *v.* Fiske, 17 Call. 380.

A party seeking the rescission of a contract for fraud, must act with vigilance and promptness, and return, or offer to return, the property to the vendor within a reasonable time after the discovery of the fraud. If the vendee keeps it and treats it as his own by putting it up for sale, or exercising other acts of ownership over it, he cannot afterwards rescind

To fix acquiescence upon a party it must unequivocally appear that he knew or had notice of the fact upon which the alleged acquiescence is founded, and to which it refers.[1] Acquiescence imports and is founded on knowledge. A recognition resulting from ignorance of a material fact goes for nothing. The question as to acquiescence cannot arise unless the party against whom it is set up was aware of his rights. A man cannot be said to acquiesce in what he does not know, nor can he be bound by acquiescence unless he is fully apprised as to his rights and all the material facts and circumstances of the case.[2]*

[1] Randall *v.* Errington, 10 Ves. 428; Spackman's Case, 34 L. J. Ch. 321, 326; Stanhope's Case, L. R. 1 Ch. App. 161; Stewart's Case, L. R. 1 Ch. App. 514.

[2] Randall *v.* Errington, 10 Ves. 426; Blennerhassett *v.* Day, 2 B. & B. 104; Cholmondeley *v.* Clinton, 2 Mer. 361; Honner *v.* Morton, 3 Russ. 65; Cockerell *v.* Cholmeley, Taml. 435; Austin *v.* Chambers, 6 Cl. & Fin. 1; Charter *v.* Trevelyan, 11 Cl. & Fin 714; Cockell *v.* Taylor, 15 Beav. 122; Burrows *v.* Walls, 5 D. M. &. 233; Lloyd *v.* Attwood, 3 D. & J. 614; Savery *v.* King, 5 H. L. 627; Bright *v.* Legerton, 2 D.

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the contract. Dill *v.* Camp, 22 Ala. 249; Taymon *v.* Mitchell, 1 Md. Ch. 496; Clement *v.* Smith, 9 Gill, 156; McCulloch *v.* Scott, 13 B. Mon. 172.

An offer to return, made through the medium of the post-office, is equivalent to a personal offer, and secures to the vendee every benefit resulting from it. Barnett *v.* Stanton, 2 Ala. 181.

When the vendee, upon offering to return the property, is informed that it will not be received, he need not perform the vain and idle task of making a personal tender. Tibbs *v.* Timberlake, 4 Litt. 12.

A purchaser, after an offer to return, must deliver the goods to the vendor upon a reasonable demand, and a refusal to surrender, destroys the effect of the previous tender. Bennett *v.* Fail, 26 Ala. 605.

A party is only bound to the extent of his acquiescence; beyond that, he is entitled to relief. Pollard *v.* Rogers, 4 Call, 239.

* Flagg *v.* Mann, 2 Sumner, 486; Shackelford *v.* Handley, 1 A. K. Marsh. 495; Shipp *v.* Swan, 2 Bibb, 82; Garvin *v.* Lewez, 7 Smed. & Mar. 24.

A party must use reasonable diligence to ascertain the facts. Buford *v.* Brown, 6 B. Mon. 553.

A party can not justly be regarded as confirming a contract believed to be fraudulent because he did not repudiate it at an earlier period upon a mere violent presumption of fraud instead of waiting until he can clearly establish it. Irving *v.* Thomas, 6 Ship. 418.

Nor, indeed, is a recognition of avail which assumes the validity of a transaction, if the question as to its validity does not appear to have come before the parties.[1] The mere fact that a man may have heard unfavorable rumors, and conceived suspicions, is not enough to fix him with acquiescence.[2] The proof of knowledge lies on the party who alleges acquiescence, and sets it up as a defence.[3] If the transaction has taken place under pressure, or the exercise of undue influence, it must clearly and unequivocally appear that the party against whom acquiescence is alleged was *sui juris*, and was released from the influence or the pressure under which he stood at the time of the transaction, and acted freely and advisedly in abstaining from impeaching it. Acquiescence goes for nothing so long as a man continues in the same situation in which he was at the date of the transaction.[4] But as soon as a man with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly and deliberately permits another to deal with the property, or incur expense, under the belief that the transaction has been recognized, or freely and

F. & J. 617; Life Association of Scotland *v.* Siddall, 3 D. F. & J. 74; Bullock *v.* Downes, 9 H. L. 1; Wall *v.* Cockerell, 10 H. L. 229; Berdoe *v.* Dawson, 34 Beav. 603; Vyvyan *v.* Vyvyan, 30 Beav. 65; Spackman's Case, 34 L. J. Ch. 329; Stewart's Case, L. R. 1 Ch. App. 514; *supra*, p. 132.

[1] Honner *v.* Morton, 3 Russ. 65; Wright *v.* Vanderplank, 8 D. M. & G. 133. See Baker *v.* Bradley, 7 D. M. & G. 597.

[2] Central Railway Co. of Venezuela *v.* Kisch, L. R. 2 App. Ca. 112.

[3] Bennett *v.* Colley, 2 M. & K. 225; Burrows *v.* Walls, 5 D. M. & G. 233; Life Association of Scotland *v.* Siddall, 3 D. F. & J. 58; Wall *v.* Cockerell, 10 H. L. 229; Spackman's Case, 34 L. J. Ch. 329.

[4] Gowland *v.* De Faria, 17 Ves. 25; Gregory *v.* Gregory, Coop. 201; Roche *v.* O'Brien, 1 B. & B. 338; Aylward *v.* Kearney, 2 B. & B. 463; Palmer *v.* Wheeler, *ib.* 31; Honner *v.* Morton, 3 Russ. 65; Duke of Leeds *v.* Lord Amherst, 2 Ph. 117; Addis *v.* Campbell, 4 Beav. 401; Roberts *v.* Tunstall, 4 Ha. 257; Salmon *v.* Cutts, 4 Deg. & Sm. 132; Wright *v.* Vanderplank, 8 D. M. & G. 133; Eyre *v.* M'Donnell, 15 Ir. Ch. 534; Berdoe *v.* Dawson, 34 Beav. 603.

advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity.[1] If, for instance, a man after discovering that the representations in a prospectus, on the faith of which he has purchased shares are false, deals with the shares as owner, by instructing a broker to sell them,[2] or concurs in the appointment of a committee of investigation into the affairs of the company on behalf of the shareholders,[3] there is acquiescence. So where a party, with full knowledge of the misrepresentations alleged to have been made, by his conduct agrees to treat the transaction as binding, he is precluded in equity from insisting on the misrepresentation in a suit for specific performance.[4] And where plaintiffs sought to avoid an agreement for the lease of a mine, on the ground of fraudulent misrepresentation of its value, it was held that having continued to work the mine after full knowledge of all the circumstances of the fraud, they were not entitled to relief.[5]

The equitable rule as to acquiescence applies with peculiar force to the case of property which is of a speculative character, or is subject to contingencies, and can only be rendered productive by a large and uncertain outlay.[6]

[1] Selsey *v.* Rhodes, 1 Bligh, N. S. 1; Bellew *v.* Russell, 1 Ba. & Be. 96; Blennerhassett *v.* Day, 2 Ba. & Be 118; Vigers *v.* Pike, 8 Cl. & Fin. 652; Charter *v.* Trevelyan, 11 Cl. & Finn. 714; Champion *v.* Rigby, Taml. 421, 9 L. J. Ch. N. S. 211; Maden *v.* Veevers, 5 Beav. 511; Nagle *v.* Baylor, 3 Dr. & War. 60; Edwards *v.* Meyrick, 2 Ha. 75; Loader *v.* Clark, 2 Mac. & G. 387; Stone *v.* Godfrey, 5 D. M. & G. 76; Lyddon *v.* Moss, 4 D. & J. 104; Dimsdale *v.* Dimsdale, 3 Drew. 556; Farrant *v.* Blanchford, 1 D. J. & S. 107; Archbold *v.* Scully, 9 H. L. 360. See Plenderleath *v.* Fraser, 3 V. & B. 174; Bernal *v.* Lord Donegal, 3 Dow. 133; Bayne *v* Ferguson, 5 Dow. 151; Pearson *v.* Benson, 28 Beav. 598; Gresley *v.* Mousley, 31 L. J. Ch. 543; Ernest *v.* Vivian, 33 L. J. Ch. 513; Wall *v.* Cockerell, 3 D. F. & J. 742.

[2] *Ex-parte* Briggs, L. R. 1 Eq. 483.

[3] Lawrence's Case, L. R. 2 Ch. App. 424.

[4] Macbryde *v.* Weekes, 22 Beav. 533.

[5] Vigers *v.* Pike, 8 Cl. & Finn. 562.

[6] Norway *v.* Rowe, 19 Ves. 144; Small *v.* Attwood, 6 Cl. & Finn. 232, 359; Prendergast *v.* Turton, 1 Y. & C. C. C. 98, 13 L. J. Ch. 268; Lovell *v.* Hicks, 2 Y. & C. 46; Jennings *v.* Broughton, 5 D. M. & G. 140; Clegg *v.* Edmondson, 8 D. M. & G. 787; Clements *v.* Hall, 2 D. & J. 173; Grosvenor *v.* Sherratt, 28 Beav. 659; Whal. ley *v.* Whalley, 2 D. F. & J. 310.

The representatives of a man who has acquiesced in a particular transaction, cannot be in a better position than the man himself.[1]

So, also, may a remainder-man be bound by acquiescence.[2] But there is no acquiescence, if the remainder-man acts in a transaction merely as an attorney of the tenant for life.[3]

The doctrine of acquiescence applies even as between trustee and *cestui que trust*, even in cases of express trusts.[4] A *cestui que trust*, whose interest is reversionary, though not bound to assert his title until he comes into possession, is not less capable of giving his assent to a breach of trust while the interest is in reversion, than when it is in possession. Whether he has done so or not depends on the facts of each particular case.[5]

DELAY AND LAPSE OF TIME.

The mere lapse of time during which a transaction has been allowed to stand, may render it unimpeachable in equity. A man who seeks the aid of a court of equity, must assert his claim with reasonable diligence.[6] * It is a rule of equity not to encourage stale demands, or give relief to parties who sleep on their rights. The rule is founded on the difficulty of pro-

[1] Walmesley *v.* Booth, 2 Atk. 25; Bellew *v.* Russell, 1 Ba. & Be. 96.

[2] Shannon *v.* Bradstreet, 1 Sch. & Lef. 73.

[3] Liebman *v.* Harcourt, 2 Mer. 520.

[4] Walker *v.* Symonds, 3 Sw. 64, 75; Burrows *v.* Walls, 5 D. M. & G. 233; Farrant *v.* Blanchford, 1 D. J. & S. 107.

[5] Life Association of Scotland *v.* Siddall, 3 D. F. & J. 58, 73.

[6] Smith *v.* Clay, cit. 3 Bro. C. C. 639; Jones *v.* Turberville, 2 Ves. Jr. 11; Hercy *v.* Dinwoody, *ib.* 87; Underwood *v.* Lord Courtown, 2 Sch. & Lef. 71; Hickes *v.* Cooke, 4 Dow. 16; Chalmer *v.* Bradley, 1 J. & W. 59; Walford *v.* Adie, 5 Ha. 112.

* Piatt *v.* Vattier, 9 Pet. 405; s. c. 1 McLean, 40; Lupton *v.* Janney, 13 Pet. 381; Wade *v.* Pettibone, 11 Ohio, 557; s. c. 14 Ohio, 557; McLean *v.* Barton, Harring. Ch. 279; Badger *v.* Badger, 2 Wall. 87; Hawley *v.* Cramer, 4 Cow. 717; Coleman *v.* Lyne, 4 Rand. 454; Johnson *v.* Johnson, 5 Ala. 90; Graham *v.* Davidson, 2 Dev. & Bat. Eq. 155; McKnight *v.* Taylor, 1 How. 161; Jenkins *v.* Pye, 12 Pet. 241.

curing full evidence of the character and particulars of remote transactions, and is independent of the Statute of Limitations.[1]* In the case of legal titles and legal demands, courts of equity act in obedience to the Statutes of Limitations;[2]† but if the demand is not of a legal nature, or is strictly equitable, the Statutes of Limitations are not a bar in equity. Courts of equity, however, look to them as guides,[3] and assimilate their rules as far as they can, and as far as the transactions will admit, to the law.[4]‡ Where a bar exists by statute, equity will, in analogous cases, consider the equitable rights as bound by the same limitations;[5]§ but in cases where the analogies of law do not apply, a court of equity is governed by its own inherent doctrine not to encourage stale demands. Parties who would have had the clearest title to

[1] Hovenden *v.* Lord Annesley, 2 Sch. & Lef. 630; Beckford *v.* Wade, 17 Ves. 87; Chalmer *v.* Bradley, 1 J. & W. 63; Hickes *v.* Cooke, 4 Dow. 16; Ranelliffe *v.* Parkins, 6 Dow. 149, 232; Whalley *v.* Whalley, 3 Bligh, 17; Cholmondeley *v.* Clinton, 4 Bligh, 119; Sibbering *v.* Earl of Balcarres, 3 Deg. & S. 735; Browne *v.* Cross, 14 Beav. 105; Hartwell *v.* Colvin, 16 Beav. 140; Beaden *v.* King, 9 Ha. 532; Knight *v.* Bowyer, 2 D. & J. 421, 443; Gresley *v.* Mousley, 4 D. & J. 78; Harcourt *v.* White, 28 Beav. 312; Skottowe *v.* Williams, 3 D. F. & J. 535.

[2] Hovenden *v.* Lord Annesley, 2 Sch. & Lef. 631; Foley *v.* Hill, 1 Ph. 399.

[3] Hamilton *v.* Grant, 3 Dow. 33; Whalley *v.* Whalley, 3 Bligh, 17.

[4] Cholmondeley *v.* Clinton, 4 Bligh, 1, 95; Brooksbank *v.* Smith, 2 Y. & C. 60.

[5] Smith *v.* Clay, cit. 3 Bro. C. C. 639; Hovenden *v.* Lord Annesley, 2 Sch. & Lef. 607, 632; Whalley *v.* Whalley, 3 Bligh, 17; Cholmondeley *v.* Clinton, 4 Bligh, 1, 119; Sibbering *v.* Earl of Balcarres, 3 Deg. & S. 735; Duke of Leeds *v.* Lord Amherst, 2 Ph. 117.

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* Prevost *v.* Gratz, 6 Wheat. 481; Randolph *v.* Ware, 3 Cranch, 503; Weatherford *v.* Tate, 2 Strobh. Eq. 27; Peacock *v.* Black, 1 Halst. Ch. 535; 3 Green's Ch. 61; Bond *v.* Brown, 1 Harp. Ch. 270; Page *v.* Booth, 1 Rob. 161; Ludlow *v.* Cooper, 13 Ohio, 552; Graham *v.* Torreance, 1 Ired. Eq. 210; Shearin *v.* Eaton, 2 Ired. Eq. 282.

† Peyton *v.* Stith, 5 Pet. 485; Humbert *v.* Trinity Church, 7 Paige, 195; s. c. 24 Wend. 587; Hawley *v.* Cramer, 4 Cow. 717.

‡ Kane *v.* Bloodgood, 7 Johns. Ch. 90; Elmendorf *v.* Taylor, 10 Wheat. 152; Hunt *v.* Wickliffe, 2 Pet. 201; Varlick *v.* Edwards, 1 Hoff. Ch. 382.

§ Michoud *v.* Girod, 4 How. 503; Miller *v.* McIntyre, 6 Pet. 61; Bowman *v.* Wathen, 1 How. 189; Perkins *v.* Cartmell, 4 Harring. 270.

relief, had they come in reasonable time, may deprive themselves of their equity by a delay which falls short of the period fixed by the statutes.[1] Lapse of time, when it does not operate as a positive or statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver.[2] The two propositions of bar by length of time, and bar by acquiescence, are not distinct propositions. They constitute but one proposition.[3] Acquiescence, however, as distinguished from delay, imports conduct.[4]

The rule that a man who sleeps on his rights cannot come to a court of equity for relief, holds good not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would have been given had there been no delay.[5]

No precise or defined limit of time can be stated within which the interposition of the court must be sought. What is a reasonable time cannot well be defined so as to establish any general rule, and must in a great measure depend upon the exercise of the sound discretion of the court under all the circumstances of each particular case.[6] * In Gregory *v.*

[1] Oliver *v.* Court, 8 Pri. 167, 168; Gregory *v.* Gregory, Coop. 201; Hickes *v.* Cooke, 4 Dow. 16; Whalley *v.* Whalley, 3 Bligh, 17; Cholmondeley *v.* Clinton, 4 Bligh, 1, 95; Champion *v.* Rigby, 9 L. J. Ch. N. S. 211; Sibbering *v.* Earl of Balcarres, 3 Deg. & S. 735; Roberts *v.* Tunstall, 4 Ha. 257; Browne *v.* Cross, 14 Beav. 106; Hartwell *v.* Colvin, 16 Beav. 140; Baker *v.* Read, 18 Beav. 398; Wright *v.* Vanderplank, 8 D. M. & G. 133; Gresley *v.* Mousley, 4 D. & J. 78; Lyddon *v.* Moss, *ib.* 104; Harcourt *v.* White, 28 Beav. 312; Clegg *v.* Edmondson, 8 D. M. & G. 810; Clanricarde *v.* Henning, 30 Beav. 175; Wentworth *v.* Lloyd, 32 Beav. 467; Downes *v.* Jennings, *ib.* 290.

[2] Pickering *v.* Lord Stamford, 2 Ves. Jr. 583; Gregory *v.* Gregory, Coop. 201; Whalley *v.* Whalley, 3 Bligh, 1, 13; Roberts *v.* Tunstall, 4 Ha. 257; Life Association of Scotland *v.* Siddall, 3 D. F. & J. 73. See Stewart's Case, L. R. 1 Ch. App. 513.

[3] Life Association of Scotland *v.* Siddall, 3 D. F. & J. 73, *per* Turner, L. J.

[4] Lyddon *v.* Moss, 4 D. & J. 104. See Murray *v.* Palmer, 2 Sch. & Lef. 486; Archbold *v.* Scully, 9 H. L. 360

[5] Beckford *v.* Wade, 17 Ves. 87, 97.

[6] Gresley *v.* Mousley, 4 D. & J. 78.

* Hawley *v.* Cramer, 4 Cow. 717; Banks *v.* Judah, 8 Ct. 145; Hallett *v.*

Gregory,[1] Sir W. Grant, M. R., refused to set aside a purchase by a trustee after a lapse of eighteen years. So in Selsey *v.* Rhoades,[2] where a lease was granted to a steward, and eleven years had elapsed, the court refused to set the lease aside, though there were special circumstances in the case. So in Baker *v.* Reed,[3] a bill filed after the lapse of seventeen years, to set aside a purchase of a testator's estate by his executor at an undervalue, was dismissed on the ground of delay.[4] The question as to delay may be much affected by reference to the nature of the property,[5] or to the change of circumstances as to the character or value of the property in the intermediate period.[6] * A delay which might have been of no consequence in an ordinary case, may be amply sufficient to bar the title of relief, when the property is of a speculative character, or is subject to contingencies,[7] or where the rights and liabilities of others have been in the meantime varied.[8] If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the

[1] Coop. 201.

[2] 2 Sim. & St. 41; 1 Bligh, N. S. 1.

[3] 18 Beav. 398.

[4] See Purcell *v.* Macnamara. 14 Ves. 91; Oliver *v.* Court, 8 Pri. 127; Molony *v.* L'Estrange, Beat. 406; Gillett *v.* Peppercorn, 3 Beav. 78; Roberts *v.* Tunstall, 4 Ha. 257; Mathew *v.* Brise, 14 Beav. 343; Aspland *v.* Watte, 20 Beav. 480; Allfrey *v.* Allfrey, 1 Mac. & G. 87; Barwell *v.* Barwell, 34 Beav. 371; Potts *v.* Surr, *ib.* 543; Proctor *v.* Robinson, 35 Beav. 335.

[5] Hatch *v.* Hatch, 9 Ves. 292; Wright *v.* Vanderplank, 8 D. M. & G. 133; Clegg *v.* Edmondson, *ib.* 807; Ernest *v.* Vivian, 33 L. J. Ch. 513.

[6] Hickes *v.* Cooke, 4 Dow. 16; Wentworth *v.* Lloyd, 32 Beav. 467; Ridgway *v.* Newstead, 3 D. F. & J. 474.

[7] Attwood *v.* Small, 6 Cl. & Fin. 232, 357; Walford *v.* Adie, 5 Ha. 112; Prendergast *v.* Turton, 1 Y. & C. C. C. 98; 13 L. J. Ch 268; Clegg *v.* Edmondson, 8 D. M. & G. 787; Clements *v.* Hall, 2 D. & J. 173; Ernest *v.* Vivian, 33 L. J. Ch. 513.

[8] Ridgway *v.* Newstead, 3 D. F. & J. 474. See Hickes *v.* Cooke, 4 Dow. 16; Potts *v.* Surr, 34 Beav. 543.

Collins, 10 How. 174; Michoud *v.* Girod, 4 How. 503; Boone *v.* Chiles, 10 Pet. 177; Coulson *v.* Walton, 9 Pet. 62; King *v.* Morford, Saxton, 274; Aylett *v.* King, 11 Leigh, 486; Nelson *v.* Carrington, 4 Munf. 332; Reardon *v.* Seavy, 1 Litt. 53; Obert *v.* Obert, 1 Beasley, 423.

* Wagner *v.* Baird, 7 How. 234; Smith *v.* Thompson, 7 B. Mon. 305 Carroll *v.* Rice, 1 Walker's Ch. 373; M'Donald *v.* Neilson, 2 Cow. 139; Ferson *v.* Sanger, Davies, 252.

earliest possible time.[1] He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage.[2] * Parties who are in the position of shareholders in companies must, if they come to the court to be released from their shares on the ground of fraud, come with the utmost diligence and promptitude.[3] In the case of companies formed under the Companies' Act, 1862, persons who apply for shares on the faith of a prospectus, are bound to ascertain at the earliest possible moment whether the memorandum and articles of association are in accordance with the prospectus. If they fail to do so, and the objects of the company are extended beyond those described in the prospectus, the persons who have so taken shares on the faith of the prospectus will be held bound by acquiescence.[4]

The question as to delay may be also materially affected by reference to the relation which subsists between the parties. If, for instance, the transaction be between solicitor and client, a delay which would be fatal in other cases may be permitted, for the solicitor must know that the *onus* of supporting the transaction will rest on him, and that, if he desire it to be upheld, he must preserve the evidence which will be required to uphold it.[5]

The rules of the court as to lapse of time being a bar in

[1] Jennings *v.* Broughton, 5 D. M. & G. 126; Ernest *v.* Vivian, 33 L. J. Ch. 513.

[2] Walford *v.* Adie, 5 Ha. 112; Prendergast *v.* Turton, 13 L. J. Ch. 268; Cowell *v.* Watts, 19 L. J. Ch. 455; Lawrence's Case, L. R. 2 Ch. App. 425.

[3] Reese River Silver Mining Co., Smith's Case, L. R. 2 Ch App. 613; Denton *v.* Macneil, L. R. 2 Eq. 352; Taite's Case, L. R. 3 Eq. 795; Whitehouse's Case, *ib.* 794; Central Railway Co. of Venezuela *v.* Kisch, L. R. 2 App. Ca. 125.

[4] Peel's Case, L. R. 2 Ch. App. 684; Oakes *v.* Turquand, L. R. 2 App. Ca. 352, *per* Lord Chelmsford.

[5] Gresley *v.* Mousley, 4 D. & J. 78. See M'Donald *v.* M'Donald, 1 Bligh, 315; Morgan *v.* Lewes, 4 Dow. 29, 45; Champion *v.* Rigby, 9 L. J. Ch. N. S. 211; Allfrey *v.* Allfrey, 1 Mac. & G. 87. Comp. Lyddon *v.* Moss, 4 D. & J. 104.

* Banks *v.* Judah, 8 Ct. 145; Pintard *v.* Martin, 1 Smed. & Mar. 126; Rogers *v.* Saunders, 18 Me. 94.

equity, apply to cases of constructive trust,[1] * and even to transactions between trustee and *cestui que trust* in respect of the trust estate,[2] as well as to ordinary transactions. Length of time can, however, have no effect between trustee and *cestui que trust*, except the trusts are properly executed.[3] There is a wide distinction between trusts which are actual and express, and constructive trusts. A trust by which a man undertakes to hold and apply property for the benefit of another is widely different from the case of ownership, subject to the claims of another, if he thinks proper to enforce it.[4] In the case of continuing express trusts, created by act of parties, no time is a bar, for from the privity existing between the parties, the possession of the one is the possession of the other, and there is no adverse title.[5] † Nor is length of time a

[1] Hovenden *v.* Lord Annesley, 2 Sch. & Lef. 633; Beckford *v.* Wade, 17 Ves. 97; *Ex-parte* Hasell, 3 Y. & C. 617; Clegg *v.* Edmondson, 8 D. M. & G. 787; Clanricarde *v.* Henning, 30 Beav. 180. See Rolfe *v.* Gregory, 34 L. J. Ch. 275.

[2] Gregory *v.* Gregory, Coop. 201; Roberts *v.* Tunstall, 4 Ha. 257; Baker *v.* Reid, 18 Beav. 398; Barwell *v.* Barwell, 34 Beav. 371; but see Smith *v.* Bakes, 20 Beav. 568.

[3] Franks *v.* Bollans, 37 L. J. Ch. 155.

[4] Toft *v.* Stephenson, 7 Ha. 15.

[5] Cholmondeley *v.* Clinton, 4 Bligh, 1; Wedderburn *v.* Wedderburn, 2 Keen, 749, 4 M. & C. 41; Knight *v.* Bowyer, 2 D. & J. 421, 443; Clanricarde *v.* Henning, 30 Beav. 175. See Att.-Gen. *v.* Fishmongers' Co., 5 M. & C. 16; Life Association of Scotland *v.* Siddall, 3 F. & J. 58, 73; M'Donnell *v.* White, 11 H L. 570. See Franks *v.* Bollans, 37 L. J. Ch. 155.

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* Farnam *v.* Brooks, 9 Pick. 212; Boone *v.* Chiles, 10 Pet. 177; Elmendorf *v.* Taylor, 10 Wheat. 152; Beaubien *v.* Beaubien, 23 How. 190; Tate *v.* Connor, 2 Dev. Eq. 224; Locke *v.* Armstrong, 2 Dev. & Bat. Eq. 247.

† Michoud *v.* Girod, 4 How. 503; Seymour *v.* Freer, 8 Wall. 202; Decouche *v.* Swetier, 3 Johns. Ch. 190; Cook *v.* Williams, 1 Green's Ch. 209; State *v.* McGowen, 2 Ired. Eq 9; Pinson *v.* Ivey, 1 Yerg. 296; Lexington *v.* Lindsay, 2 A. K. Marsh 443; Lindsay *v.* Lindsay, 1 Dessau. 150.

Limitations begin to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*. Oliver *v* Piatt, 3 How. 333; Kane *v.* Bloodgood, 7 Johns. Ch. 90; Boone *v.* Chiles, 10 Pet. 90; Taylor *v.* Benham, 5 How. 233; Wade *v.* Green, 3 Humph. 547.

bar where a debt has accrued in consequence of a violation of confidence bestowed in a fiduciary character.[1] But if the trust, though express, be not continuous, and the case be one of gross laches, the general rule of equity, that encouragement is not to be given to stale demands, is equally applicable.[2]

If there be laches on both sides, the ordinary rules as to delay and acquiescence may not apply.[3]

Time, however, does not begin to run against a man in cases of fraud, until he has knowledge of the fraud. Time begins to run only from the discovery.[4]* The Statute of Limitations is no bar in equity in cases of fraud.[5] The right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.[6] Lapse of time imputed as

[1] Teed *v.* Beere, 5 Jur. N. S. 381.
[2] Bright *v.* Legerton, 2 D. F. & J. 606. See M'Donnell *v.* White, 11 H. L. 570.
[3] Hicks *v.* Morant, 2 Dow & Cl. 414.
[4] Blennerhasset *v.* Day, 2 Ba. &. Be. 129; Blair *v.* Bromley, 5 Ha. 559, 2 Ph. 360; Allfrey *v.* Allfrey, 1 Mac. & J. 99; Walsham *v.* Stainton, 1 D. J. & G. 678; Re Reese Silver Mining Co., Smith's Case, L. R. 2 Ch. App. 613.
[5] Sturgis *v.* Morse, 24 Beav. 541.
[6] Rolfe *v.* Gregory, 84 L. J. Ch. 275 See Allfrey *v.* Allfrey, 1 Mac. & G. 99.

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* Veazie *v.* Williams, 8 How. 134; Wamburzee *v.* Kennedy, 4 Dessau. 474; Longworth *v.* Hunt, 11 Ohio St. R. 194; Pendleton *v.* Galloway, 9 Ohio, 178; Haywood *v.* Marsh, 6 Yerg. 69; Harrell *v.* Kelly, 2 McCord, 426; Huston *v.* Cantril, 11 Leigh, 136; Eigleberger *v.* Kibler, 1 Hill's Ch. 113; Steele *v.* Kinkle, 3 Ala. 352.

No case can be found in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered, or becomes known to the party whose rights are affected. Michaud *v.* Girod, 4 How. 503.

The rule only applies where the trust is clearly established, and where the facts have been fraudulently and successfully concealed by the trustee from the *cestui que trust.* Badger *v.* Badger, 2 Wall. 87.

Where a party by his own fraudulent acts and representations has allayed all reasonable suspicion of his original fraud, and thus attempted to obtain an unconscious advantage by the lapse of time, a court of equity

laches may be excused by the obscurity of the transaction, whereby a man is disabled from obtaining full information of his rights.[1] Time does not begin to run against a man, so as to bar the remedy, until he has full information of his rights and injuries,[2]* or has in his possession the means of knowl-

[1] Murray *v.* Palmer, 2 Sch. & Lef. 486.

[2] Salkeld *v.* Vernon, 1 Eden, 64; Blennerhasset *v.* Day, 2 Ba. & Be. 104, 119; Whalley *v.* Whalley, 3 Bligh, 1; O'Neill *v.* Hamill, Beat. 618; Trevelyan *v.* Charter, 4 L. J. Ch. N. S. 209; Charter *v.* Trevelyan, 11 Cl. & Fin. 714; Browne *v.* Cross, 14 Beav. 106; Parker *v.* Bloxam, 20 Beav. 295; Savery *v.* King, 5 H. L. 627.

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will disregard the statute of limitations. Phalen *v.* Clark, 19 Ct. 421; McClure *v.* Ashby, 7 Rich. Eq. 430.

Where there is a separate and distinct chancery jurisdiction, the question of fraud as a means of preventing the effect and operation of the statute of limitations must be referred to that jurisdiction, and is not to be relied on by way of replication to the plea of the statute in a court of law. Franklin *v.* Waters, 8 Gill, 322.

Fraud can not be replied to a plea of the statute of limitations in a court of law. Troupe *v.* Smith, 20 Johns. 33; Leonard *v.* Pitney, 5 Wend. 30; Callis *v.* Waddy, 2 Munf. 511; Rice *v.* White, 4 Leigh, 474; Miles *v.* Barry, 1 Hill (S. C.), 296; Hamilton *v.* Smith, 3 Murph. 115; Ruddick *v.* Leggatt, 3 Murph. 539; Baines *v.* Williams, 3 Ired. 481; Franklin *v.* Waters, 8 Gill, 322; Smith *v.* Bishop, 9 Vt. 110; Lewis *v.* Houston, 11 Tex. 642; Campbell *v.* Vining, 23 Ill. 525; Way *v.* Cutting, 20 N. H. 187; Duvall *v.* Stafford, 4 Bibb, 318. *Contra*, Mass. Turnpike Co. *v.* Field, 3 Mass. 201; Livermore *v.* Johnson, 27 Miss. 284; Cole *v.* McGlathry, 9 Greenl. 131; Jones *v.* Conoway, 4 Yeates, 109; Harrisburg Bank *v.* Foster, 8 Watts, 12; Bucker *v.* Lightner, 40 Penn. 139; Raymond *v.* Simonson, 4 Blackf. 85; Mitchell *v.* Thompson, 1 McLean, 85; Sherwood *v.* Sutton, 5 Mason, 143; Cocke *v.* M'Ginniss, 1 Mart. & Yerg. 361; Fee *v.* Fee, 10 Ohio, 460; Conyers *v.* Kenans, 4 Geo. 308; Persons *v.* Jones, 12 Geo. 371, Harrell *v.* Kelly, 2 McCord, 26.

The fraud that will be sufficient to remove the bar of the statute of limitations must be actual, not constructive fraud. Farnam *v.* Brooks, 9 Pick. 212.

The plaintiff can not excuse his negligence by the fact that the defendant knew all along that he was in the wrong. Whatever the character of the injury, and whether committed in good or bad faith, the statute bases itself on time. Humbert *v.* Trinity Church, 7 Paige, 195; s. c. 24 Wend. 587.

* Munson *v.* Hallowell 27 Tex. 457; Tate, *v.* Tate. 1 Dev. & Bat. Eq. 22; Croft *v.* Arthur, 3 Dessau. 223.

edge,[1] * or, at least, has sufficient notice to put him on inquiry,[2]† and, in cases where the transaction has taken place under pressure, or the exercise of undue influence, is emancipated from the dominion under which he stood at the date of the transaction.[3] The objection of time is removed, so long as a man remains, without any fault of his own, in ignorance of his rights and injuries,[4] or is under a legal disability,[5]‡ or so long as the dominion or undue influence which vitiated the transaction is in full force.[6] The mere fact, however, of the poverty or pecuniary embarrassment of the injured or defrauded party, is not a sufficient excuse for delay;[7] § nor will the mere notice or assertion of a claim, unaccompanied by

[1] Baker *v.* Read, 3 W. R. 118.

[2] Clanricarde *v.* Henning, 30 Beav. 175; Spackman's Case, 34 L. J. Ch. 321, 326; Stanhope's Case, L. R. 1 Ch. App. 161. See Doggett *v.* Emerson, 3 Story (Amer.), 733; Comp. Partridge *v.* Usborne, 5 Russ. 195, 232; Re Reese River Silver Mining Co., Smith's Case, L. R. 2 Ch. App. 612.

[3] Gregory *v.* Gregory, Coop. 201; Dawson *v.* Massey, 1 B. & B. 219; Roche *v.* O'Brien, *ib.* 338; Aylward *v.* Kearney, 2 B. & B. 468; O'Neill *v.* Hamill, Beat. 618; Addis *v.* Campbell, 4 Beav. 401; Champion *v.* Rigby, 9 L. J. Ch. N. S. 211; Bellamy *v.* Sabine, 2 Ph. 425; Grosvenor *v.* Sherratt, 28 Beav. 659; Sharp *v.* Leach, 31 Beav. 491.

[4] Trevelyan *v.* Charter, 4 L. J. Ch. N. S. 209; Charter *v.* Trevelyan, 11 Cl. & Fin. 714; Allfrey *v.* Allfrey, 1 Mac. & G. 87; Bromley *v.* Blair, 16 L. J. Ch. 108; Mathew *v.* Brise, 14 Beav. 343; Rolfe *v.* Gregory, 34 L. J. Ch. 275; Spackman's Case, *ib.* 329; Stanhope's Case, L. R. 1 Ch. Ap. 161.

[5] Duke of Leeds *v.* Lord Amherst, 2 Ph. 117; Neesom *v.* Clarkson, 2 Ha. 163; Wright *v.* Vanderplank, 8 D. M. & G. 133; Gresley *v.* Mousley, 4 D. & J. 78.

[6] Wright *v.* Vanderplank, 8 D. M. & G. 133; Gresley *v.* Mousley, 4 D. & J. 78; Sharp *v.* Leach, 31 Beav. 491. See Gregory *v.* Gregory, Coop. 201; Addis *v.* Campbell, 4 Beav. 401.

[7] Roberts *v.* Tunstall, 4 Ha. 257; Champion *v.* Rigby, Taml. 421; 9 L. J. Ch. N. S. 211. See Hovenden *v.* Lord Annesley, 2 Sch. & Lef. 607, 639.

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* Farnam *v.* Brooks, 9 Pick. 212; Hite *v.* Hite, 1 B. Mon. 177; Shannon *v.* White, 6 Rich. Eq. 96; Buckner *v.* Calcote, 28 Miss. 432; Parkham *v.* McCrary, 6 Rich. Eq. 140.

† Maxwell *v.* Kennedy, 8 How. 210; Edmonds *v.* Goodwin, 28 Geo. 38; Smith *v.* Talbot, 18 Tex. 774; Smith *v.* Fly, 24 Tex. 345; Whaley *v.* Eliott, 1 A. K. Marsh. 343.

‡ Ochler *v.* Walker, 2 H. & G. 323; Carr *v.* Bob, 7 Dana, 417; Fall *v.* Torreance, 2 Hawks, 490.

There is no equity from a disability that was voluntary and self-imposed. Wagner *v.* Bird, 7 How. 234.

§ Perry *v.* Crary, 3 Mo. 316; Locke *v.* Armstrong, 2 Dev. & Bat. Eq. 147.

any act to give it effect, keep alive a right which would be otherwise barred.[1]

When time has once begun to run against a man, all persons who derive their right through him will be affected with the disabilities which affected him.[2] Nor can the representatives of a man be in a better position than the man himself.[3] A remainder-man may, during the life of the tenant for life, file a bill to impeach a sale under a decree, but he is not barred by laches, if he wait until the death of the tenant for life.[4]

PURCHASE FOR VALUE WITHOUT NOTICE.

The right to impeach a transaction on the ground of fraud, has no place as against third parties, who have paid money and acquired a legal right to property, without notice of the fraud. As against a purchaser for valuable consideration without notice, having the legal title, no relief can be had in equity. If a man has paid his money in ignorance of the fact that another party has an equitable claim to the property, a court of equity will not deprive him of the benefit of his legal title, even although his equitable claim be of later date than that of the other party.[5] * The rule that a man who advances money

[1] Clegg *v.* Edmondson, 8 D. M. & G. 787; Ernest *v.* Vivian, 33 L. J. Ch. 513.

[2] Clanricarde *v.* Henning, 30 Beav. 175; Ernest *v.* Vivian, 33 L. J. Ch. 513. See Murray *v.* Palmer, 2 Sch. & Lef. 486; Whalley *v.* Whalley, 3 Bligh, 1.

[3] Skottowe *v.* Williams, 3 D. F. & J. 535. See Bellew *v.* Russell, 1 Ba. & Be. 96.

[4] Bowen *v.* Evans, 1 J. & L. 265.

[5] Lloyd *v.* Passingham, Coop. 152; Att.-Gen. *v.* Flint, 4 Ha. 156; Blackie *v.* Clark, 15 Beav. 595; Cobbett *v.* Brock, 20 Beav. 528; Dawson *v.* Prince, 2 D. & J. 41; Dodds *v.* Hills, 2 H. & M. 424; Comp. Vorley *v.* Cooke, 1 Giff. 230; Ogilvie *v.* Jeaffreson, 2 Giff. 379; Cottam *v.* Eastern Counties Railway Co. 1 J. & H. 243. See Purcell *v.* Kelly, Beat. 492; Eyre *v.* Burmester, 10 H. L. 90.

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* Hawley *v.* Cramer, 4 Cow. 717; Green *v.* Tanner, 8 Met. 411; Love *v.* Braxton, 5 Call, 537; Cressy *v.* Philips, 2 Root, 420; Wamburzee *v.* Kennedy, 4 Dessau. 474; Moore *v.* Clay, 7 Ala. 742; Owings *v.* Juit, 2 A. K. Marsh. 380; Lemmon *v.* Brown, 4 Bibb, 308; Prevo *v.* Walters, 4 Scam. 35.

A grantee holding property under a fraudulent deed, may convey it so

bonâ fide, and without notice of the infirmity of the title of the seller, will be protected in equity, applies equally to real estate, chattels, and personal estate.[1] The rule is subject to no exceptions even in favor of charities.[2]

A purchaser for valuable consideration without notice of any defect in his title, or of the existence of any prior equitable incumbrance at the time when he advanced his money, may buy in or obtain any outstanding legal estate, not held upon express trust for an adverse claimant, or a judgment, or any other legal advantage, the possession of which may be a protection to himself or an embarrassment to other claimants.[3]

[1] Joyce *v.* De Moleyns, 2 J. & L. 377; Dawson *v.* Prince, 2 D. & J. 49; Dodds *v.* Hills, 2 H. & M. 424. See Thorndike *v.* Hunt, 3 D. &. J. 563; Case *v.* James, 29 Beav. 512.

[2] Att.-Gen. *v.* Wilkins, 17 Beav. 293.

[3] Saunders *v.* Dehew, 2 Vern. 471; Willoughby *v.* Willoughby, 1 T. R. 763; Jerrard *v.* Saunders, 2 Ves. Jr. 458; Maundrell *v.* Maundrell, 10 Ves. 246; Hughes *v.* Garner, 2 Y. & C. 328; Carter *v.* Carter, 3 K. & J. 617; Bates *v.* Johnson, Johns. 304; Sharples *v.* Adams, 32 Beav. 213; Fagg *v.* James, 8 L. T. N. S. 7. See Prosser *v.* Rice, 28 Beav. 68; Dodds *v.* Hills, 2 H. & M. 424.

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as to bind the creditors of the grantor. Roberts *v.* Anderson, 18 Johns. 515; s. c. 3 Johns. Ch. 371; Neal *v.* Williams, 6 Shep. 391; Green *v.* Tanner, 8 Met. 411; Coleman *v.* Cocke, 6 Rand. 618; Bean *v.* Smith, 2 Mason, 252; Dugan *v.* Vattier, 3 Blackf. 245; Cummings *v.* McCullough, 5 Ala. 324; Boyce *v.* Waller, 2 B. Mon. 91; Agricultural Bank *v.* Dorsey, 1 Freem. Ch. 338; *contra*, Preston *v.* Crofut, 1 Day, 527; Read *v.* Slater, 3 Hayw. 159.

A person who is by construction turned into a trustee without any knowledge on his part that he is trustee, or of the facts that make him trustee, may be a *bonâ fide* purchaser of the share of another tenant in common of the same property. Giddings *v.* Eastman, 5 Paige, 561.

The true question is, whether the purchaser has acted in good faith and purchased under circumstances of apparent right in the vendor to convey. A purchase by way of a mere release where, by reason of a priority of estate between the parties, it operates by way of enlarging the estate of the releasee, or of passing the estate of the releasor, may make a *bonâ fide* purchaser. Flagg *v.* Mann, 2 Sumner, 486.

The rule of law, which secures protection to a *bonâ fide* purchaser who has dealt in good faith with a fraudulent vendee having the possession, applies with equal force to a case where the original sale and delivery were subject to conditions of which he is ignorant. Hall *v.* Hinks, 21 Md. 406; *contra*, Coggill *v.* Hartford & New Haven R. R. Co., 3 Gray, 545.

The authorities establish that a purchaser from a person in possession, purchasing without notice of any prior charge or trust, and obtaining a conveyance of the legal estate from a trustee of a satisfied term or mortgagee, whose mortgage is satisfied, will be protected in this court against a prior incumbrance or *cestui que trust*, provided the party so conveying the legal estate has no notice of the prior trust or incumbrance. But it has never been decided that where the party so conveying has notice of an express prior trust or incumbrance, the purchaser can protect himself therefrom by means of the legal estate.[1] Although a man having notice of an intervening incumbrance may get in any outstanding legal estate, which a person without notice of any intervening incumbrance may *bonâ fide* assign to him, he cannot procure a conveyance from a person who himself has a duty to perform, and who by such conveyance would, in fact, be making over the estate to protect the former against the very interests which it was his duty to protect.[2] Some of the earlier cases on the subject of purchase for value without notice, have, it may be observed, gone to further length than would be supported by modern decisions.[3]

The protection from getting in the legal estate extends even to cases where the apparent or asserted equitable title is deduced through a forged instrument;[4] provided the asserted or apparent title of the party from whom it was derived was clothed with possession.[5] If the asserted or apparent title is deduced through a forged instrument, or through an instrument which has been obtained by a trick or a cheat, the doctrine of purchase for value without notice cannot apply, unless the party from whom the title is deduced had taken possession,

[1] Carter *v.* Carter, 3 K. & J. 617, 640.

[2] *Ib.* 642.

[3] *Ib.* 636, *per* Wood, L. J.

[4] Jones *v.* Powles, 3 M. & K. 581; Dawson *v.* Prince, 2 D. & J. 41. See Lloyd *v.* Passingham, Coop. 152; Bowen *v.* Evans, 1 J. & L. 264; Lloyd *v.* Attwood, 3 D. & J. 655; Comp. Esdaile *v.* La Nauze, 1 Y. & C. 400.

[5] Jones *v.* Powles, 3 M. & K. 596; Ogilvie *v.* Jeaffreson, 2 Giff. 380. See Cottam *v.* Eastern Counties Railway Co., 1 J. & H. 248.

and being in possession, as apparent owner, had sold and conveyed for value.[1] *

To raise the equity of purchase for value without notice, it is not necessary to prove possession. It is enough that the purchase be from an apparent owner who was actually in possession.[2] If, however, an instrument, which purports to convey a legal estate or interest, be a forged instrument, no title can be acquired under it. A man who takes under such an instrument has no title at all, and cannot claim as a purchaser without notice.[3] If the indorsement on a bill of exchange be forged, it is the same as if there were no indorsement at all; nor will a real indorsement by the payee after the bill has arrived at maturity, give the holder any title, if the original indorsement was a forgery.[4]

The legal estate will not protect a purchaser against the claims of persons whose prior right to its protection was known to him before completion of the purchase, even although the extent of such claims were unknown; for instance, when A, knowing that B had a charge on the property, accepted a mortgage of the estate, relying on the mortgagor's covenant, and then got in an old outstanding term of years, it was held that B, having, in respect of A's notice of the first incumbrance, a preferable right to require an assignment of the term, was entitled to priority not only in respect of such first incumbrance, but also in respect of a subsequent charge of which A had no notice at the date of his advance.[5]

[1] Ogilvie *v.* Jeaffreson, 2 Giff. 380.
[2] Wallwynn *v.* Lee, 9 Ves. 24; Ogilvie *v.* Jeaffreson, 2 Giff. 379.
[3] Esdaile *v.* La Nauze, 1 Y. & C. 399. See Cottam *v.* Eastern Counties Railway Co., 1 J. & H. 248.
[4] Esdaile *v.* La Nauze, 1 Y. & C. 399.
[5] Willoughby *v.* Willoughby, 1 T. R. 763. See Sharples *v.* Adams, 32 Beav. 213.

* Case *v.* Jennings, 17 Tex. 661; Brower *v.* Peabody, 3 Kernan, 121 Caldwell *v.* Bartlett, 3 Dacr, 341; Johnson *v.* Boyles, 26 Ala. 576; Wooster *v.* Sherwood, 25 N. Y. 278.

The doctrine in regard to the effect of notice, does not affect a title derived from another person, in whose hands it stood free from any such taint. A purchaser will not be affected by notice of an equitable claim, if he purchase from a vendor who himself bought *bonâ fide* without notice.[1]* So, also, if a person who has notice sells to another who has no notice, and is, also, a *bonâ fide* purchaser for valuable consideration, the latter may protect his title, although it was affected with the equity arising from notice in the hands of the person from whom he received it.[2]† A person affected by notice has the benefit of want of notice by intermediate purchasers.[3] The *bonâ fide* purchase of an estate for valuable consideration, purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the meditated fraud. If the estate becomes revested in him, the original equity will attach to it in his hands.[4]‡ A purchaser, however, having notice, cannot insist on holding the legal estate as against those parties with notice, of whose right that estate was taken.[5] A man who has notice of a fact which ought to

[1] Harrison *v.* Forth, Prec. Ch. 51; 1 Eq. Ca. Ab. 331, pl. 6; Lowther *v.* Carlton, 2 Atk. 242; Brandlyn *v.* Ord, 1 Atk. 571; Sweet *v.* Southcote, 2 Bro. C. C. 66; Andrew *v.* Wrigley, 4 *ib.* 125. See Dart. V. & P. 585.

[2] Ferrars *v.* Cherry, 2 Vern. 384; Mertins *v.* Jolliffe, Amb. 313; Lowther *v.* Carlton, Barnard, Ch. 358; For. 187; 2 Atk. 242; Story's Eq. Jur. 409. See Dodds *v.* Hills, 2 Ha. & M. 424.

[3] McQueen *v.* Farquhar, 11 Ves. 467.

[4] Kennedy *v.* Daly, 1 Sch. & Lef. 379; Story's Eq. Jur. 410; Comp. Carter *v.* Carter, 3 K. & J. 617; Bates *v.* Johnson, John. 309.

[5] Allen *v.* Knight, 5 Ha. 278.

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* Lacy *v.* Wilson, 4 Munf. 313; Fenno *v.* Sayre, 2 Ala. 458; Holmes *v.* Stout, 3 Green's Ch. 492; City Council *v.* Page, Spear's Ch. 159; Lindsay *v.* Rankin, 4 Bibb, 482; Bumpass *v.* Platner, 1 Johns. Ch. 213; Myers *v.* Peck, 2 Ala. 648.

† Varick *v.* Briggs, 6 Paige, 223; Tompkins *v.* Penell, 6 Leigh, 576; Mallory *v.* Stodder, 6 Ala. 801; Bracken *v.* Miller, 4 W. & S. 102; Hill *v.* Paul, 8 Miss. 479; Pierce *v.* Faunce, 47 Me. 507.

‡ Fitzimmons *v.* Ogden, 7 Cranch, 218; Alexander *v.* Pendleton, 8 Cranch, 462; Jackson *v.* Henry, 10 Johns. 185.

have put him on inquiry, and which he might have discovered by using due diligence, cannot claim as a purchaser without notice.[1] If a purchaser chooses to rest satisfied without the knowledge which he has a right to require, he cannot claim as a purchaser without notice.[2] Nor can a man who has by his own act precluded himself from the means of knowledge, or from information, set up as against persons as innocent as himself, the want of information which he has precluded himself from obtaining.[3] A purchaser, for example, who buys with notice of circumstances sufficient to invalidate the sale, is not protected by a proviso that the purchaser need not inquire.[4] So, also, a man who takes the assignment of a lease under a condition not to inquire into the lessor's title, must have imputed to him the knowledge which, on prudent inquiry, he would have obtained.[5] Nor are special conditions of sale, limiting the extent of title, an excuse for a purchaser not insisting on the production of a deed beyond those limits of which he had notice.[6] Trustees of a settlement for the benefit of a particular person, cannot stand any higher than the person for whom they are trustees in respect of notice. If he is affected by notice, they cannot claim as purchasers for value without notice.[7]

Purchasers under a decree of the court take with notice of fraud apparent on the face of the decree.[8] A decree is no protection against persons of whom the purchaser has actual notice that they ought to have been, but are not, parties to the suit.[9] But a purchaser under a decree will not be affected by fraud in

[1] Jackson *v.* Rowe, 2 Sim. & St 475; Jones *v.* Powles, 3 M. & K. 596; Ker *v.* Lord Dungannon, 1 Dr. & War. 542; Robinson *v.* Briggs, 1 Sm. & G. 188; Davies *v.* Thomas, 2 Y. & C. 234; Jenkins *v.* Jones, 2 Giff. 99; Ogilvie *v.* Jeaffreson, *ib.* 378.

[2] Parker *v.* Whyte, 1 H. & M. 167.

[3] Nicoll's Case, 3 D. & J. 387.

[4] Jenkins *v.* Jones, 2 Giff. 99.

[5] Robson *v.* Flight, 34 L. J. Ch. 226; Clements *v.* Welles, L. R. 1 Eq. 200.

[6] Peto *v.* Hammond, 30 Beav. 495.

[7] Spaight *v.* Cowne, 1 H. & M. 359.

[8] Toulmin *v.* Steere, 3 Mer. 210; Gore *v.* Stackpoole, 1 Dow. 30; cit. 1 J. & L. 257.

[9] Colclough *v.* Sterum, 3 Bligh, 181, 186; Piers *v.* Piers, 1 Dr. & Wal. 265; Rolleston *v.* Morton, 1 Dr. & War. 177.

the proceedings of which he himself is innocent,[1] unless it be apparent on the face of the decree.[2] Nor is a sale impeachable on the ground of its having been the object for which the suit, professedly directed to other purposes, was in fact instituted.[3]

To entitle a man to the character of a *bonâ fide* purchaser without notice, he must have acquired the legal title, and have actually paid the purchase money, or parted with something of value by way of payment before receiving notice.[4]* A party claiming to be a purchaser for value without notice under a marriage contract, entered into in pursuance of articles, must show that he had no notice at the time of the settlement; proof that he had no notice at the time of the articles is not sufficient.[5]† The protection to which a *bonâ fide* purchaser without notice is entitled, extends only to the money which has been actually paid, or to the securities which have been actually appropriated by way of payment before notice.[6]‡ Notice before actual payment of all the purchase money,

[1] Sug. 110; Dart, 774; Bowen *v.* Evans, 1 J. & L. 178; 2 H. L. 257; Edgeworth *v.* Edgeworth, 12 Ir. Eq. 81.

[2] Gore *v.* Stackpoole, 1 Dow. 30; cit. 1 J. & L. 257.

[3] Bowen *v.* Evans, 1 J. & L. 178; 2 H. L. 257.

[4] How *v.* Weldon, 2 Ves. 516; Story *v.* Lord Windsor, 2 Atk. 630; Molony *v.* Kernan, 2 Dr. & War. 31; Borell v. Dann, 2 Ha. 440; Rayne *v.* Baker, 1 Giff. 245. See Whitworth *v.* Gaugain, Cr. & Ph. 325; Att.-Gen. *v.* Flint, 4 Ha. 147, 156.

[5] Davies *v.* Thomas, 2 Y. & C. 234.

[6] Story *v.* Windsor, 2 Atk. 630; Hardingham *v.* Nicholls, 3 Atk. 304; Rayne *v.* Baker, 1 Giff. 245.

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* Wormley *v.* Wormley, 8 Wheat. 421; Blight *v.* Banks, 6 Mon. 192; Jackson *v.* Summerville, 13 Penn. 359; Keitcrease *v.* Levin, 36 Miss. 569; Dugan *v.* Vattier, 3 Blackf. 245; Wood *v.* Mann, 1 Sumner, 506; Boswell *v.* Buchanan, 3 Leigh, 365; Goust *v.* Martin, 3 S. & R. 430.

† Flagg *v.* Mann, 2 Sumner, 484; Duphey *v.* Frenage, 5 Stew. & Port. 215; Ingerson *v.* Starkweather, Walk. Ch. 346.

‡ Jewett *v.* Palmer, 7 Johns. Ch. 65; Williams *v.* Holloway, 1 Strobh. Eq. 103; Blanchard *v.* Tyler, 12 Mich. 339; Wells *v.* Morrow, 38 Ala. 125; Jones *v.* Read, 3 Dana, 540; Pillow *v.* Shannon, 3 Yerg. 508; Curtis *v.* Hitchcock, 10 Paige, 399.

Where the consideration for an assignment or transfer from a fraudulent vendee is such that, after a reclamation and recovery by the vendor, the assignee or transferee would remain in the same condition as before

although it be secured,[1]* and the execution of the conveyance,[2] is binding in the same manner as notice had before the contract. Although, however, a purchaser after conveyance executed has no remedy at law against the payment of money, for which he has given security, he may come into equity to have the money so secured employed in discharge of newly discovered incumbrances.[3]

It has been held that notice to a purchaser after payment of the purchase money, but before execution of the conveyance, is sufficient to deprive him of the benefit of the legal

[1] Tourville *v.* Naish, 3 P. Wm. 307; Story *v.* Lord Windsor, 2 Atk. 630; Moore *v.* Mayhow, 1 Ch. Ca. 34; Hardingham *v.* Nicholls, 3 Atk. 304; Tildesley *v.* Lodge, 3 Sm. & G. 543; Comp. Cregan *v.* Cullen, 16 Ir. Ch. 339.

[2] Jones *v.* Stanley, 2 Eq. Ca. Ab. 685. See Allen *v.* Knight, 5 Ha. 272, 11 Jur. 527.

[3] Tourville *v.* Naish, 3 P. Wm. 306.

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the assignment or transfer, it is not sufficient to make such an assignment or transfer valid against the defrauded vendor. Something of value, in the way of property or money, should be given or advanced; some service rendered or liability incurred, on the faith and credit of the transfer, and as a present reciprocal consideration therefor. It follows that a transfer of property by a fraudulent vendee in consideration of a pre-existing debt, confers no title as against the defrauded vendor. Ratcliffe *v.* Sangston, 18 Md. 383; Frew *v.* Daenman, 11 Ala. 880; Ingram *v.* Morgan, 4 Humph. 66; Dickerson *v.* Tillinghast, 4 Paige, 215; Coddington *v.* Bay, 20 Johns. 637; Powell *v.* Jefferies, 4 Scam. 387.

The relinquishment of a valid security for a prior debt is a sufficient consideration. Padget *v.* Lawrence, 10 Paige, 170.

Part cash and part past indebtedness is good *pro tanto*. Pickett *v.* Barron, 29 Barb. 505.

If notice is only after a payment of part of the purchase money, the purchaser is entitled to reimbursement as a condition of giving way to the title of the owner. Lewis *v.* Beatty, 32 Miss. 52; Goust *v.* Martin, 3 S. & R. 428.

The payment must be proved by some other evidence than the mere receipt in the deed. Lloyd *v.* Lynch, 28 Penn. 419; Mitchell *v.* Pickett 23 Tex. 573.

* Notice after payment and execution, but before recording is not sufficient. Ely *v.* Scofield, 35 Barb. 330.

A purchaser with notice of a prior unrecorded conveyance may, nevertheless, hold the legal estate if he has the prior equity. Carr *v.* Callaghan, 3 Litt. 365.

estate.[1]* The point, however, is one which will require much consideration when it arises again.[2]

When a purchaser, not having got in an outstanding legal estate, has, nevertheless, from having a better equity than the other claimants, the best right to call for it, he will in equity be entitled to its protection.[3] But although the court holds that priority will give equity, yet it does not hold that it gives so superior an equity, as between several incumbrances and purchasers, as to enable the anterior claimant to wrest the legal estate from the person who has obtained it without notice of the anterior claim.[4]

The defence of a purchase for value without notice, is a shield as well against a legal title as an equitable title.[5] The principle, in other words, applies as well when the right sought to be enforced is a legal right as when it is an equitable one.[6] The court holds that it is not equitable for a person who has bought for valuable consideration without notice, to be deprived of that for which he has paid his money, and will not give any assistance to a party claiming against him, or do anything to prejudice his right,[7] but will leave the parties to their remedies at law.[8] In *Williams* v. *Lambe*,[9] however, it was held by Lord Thurlow that the defence of purchase for value without notice could not be pleaded in bar to a suit for an account of dower, which a widow having a legal title sought to enforce; and in *Collins* v. *Archer*,[10] it was held by Sir. J. Leach, M. R., that it was no answer to a bill for tithes.

[1] Wigg *v.* Wigg, 1 Atk. 382.
[2] Dart, V. & P. 540.
[3] Willoughby *v.* Willoughby, 1 T. R. 768; Bowen *v.* Evans, 1 J. & L. 265; Parker *v.* Carter, 4 Ha. 410; Dart, V. & P. 541.
[4] Rooper *v.* Harrison, 1 K. & J. 108, 109.
[5] Joyce *v.* De Moleyns, 2 J. & L. 377; Att.-Gen. *v.* Wilkins, 17 .Beav. 293.
[6] *Ib.*
[7] Walwynn *v.* Lee, 9 Ves. 24; Joyce *v.* De Moleyns, 2 J. & L. 374; Att.-Gen. *v.* Wilkins, 17 Beav. 292.
[8] Att.-Gen. *v.* Wilkins, 17 Beav 292.
[9] 3 Bro. C. C. 264
[10] 1 R. & M. 284.

* Peabody *v.* Fenton, 3 Barb. Ch. 451.

The doctrine of these cases, though disapproved of and opposed to many recent decisions,[1] has been approved of by Lord Westbury, in *Philipps* v. *Philipps*.[2] But Lord St. Leonards[3] does not approve of the reasoning of Lord Westbury in that case, and is of opinion that those cases were not correctly decided.

The defence of purchase for valuable consideration without notice, will not prevent the court from protecting property by injunction, pending litigation.[4]

Questions relating to the defence of purchase for valuable consideration without notice, are much modified by the operation of the act for rendering unnecessary the assignment of satisfied terms. If the term is gone, it will not stand in the way of the petitioner even at law.[5]

As between persons claiming merely equitable interests, the defence of purchase for value without notice has no place. A party who purchases an equity takes it subject to all the equities which affect it in the hands of the assignor. The first grantee of an equity has the right to be paid first, and it is quite immaterial whether the subsequent incumbrancers had at the time they took their securities and paid their money, notice of a prior incumbrance.[6] *

[1] See Payne *v.* Compton, 2 Y. & C. 461; Bowen *v.* Evans, 1 J. & L. 178, 264; Joyce *v.* De Moleyns, 2 J. & L. 374; Att.-Gen. *v.* Wilkins, 17 Beav. 285; Finch *v.* Shaw, 19 Beav. 509; Lane *v.* Jackson, 20 Beav. 535.

[2] 31 L. J. Ch. 321, 326.

[3] Sug. V. & P. 790, 796.

[4] Greenslade *v.* Dare, 17 Beav. 502.

[5] Finch *v.* Finch, 19 Beav. 500; Corry *v.* Cremorne, 12 Ir. Ch. 136.

[6] Frazer *v.* Jones, 17 L. J. Ch. 353, 356; Manningford *v.* Toleman, 1 Coll. 670; Rooper *v.* Harrison, 2 K. & J. 108, 109; Ford *v.* White, 16 Beav. 120; Stackhouse *v.* Countess of Jersey, 1 J. & H. 721; Case *v.* James, 3 D. F. & J. 264; Parker *v.* Clarke, 30 Beav. 54; Cory *v.* Eyre, 1 D. J. & S. 167; Philipps *v.* Philipps, 31 L. J. Ch. 321, 326. See Liebman *v.* Harcourt, 2 Mer. 520; Rice *v.* Rice, 2 Drew. 73; Eyre *v.* Burmester, 10 H. L. 90; Dodds *v.* Hills, 2 H. & M. 424; Comp. Lane *v.* Jackson, 20 Beav. 539.

* Poillon *v.* Martin, 1 Sandf. Ch. 569; Crawford *v.* Beetholf, Saxton, 458; Jones *v.* Zollicoffer, 2 Taylor, 214; Pinson *v.* Ivey, 1 Yerg. 296; Dupont *v.* Wetherman, 10 Cal. 354.

Where a party has nothing more than an equitable interest, another party who has a prior equitable interest will generally be preferred, the general rule being that, as between equities, he who is prior in point of time is prior in point of right.[1] The maxim, *qui prior est tempore potior est jure*, always applies between equities, unless there be something to take the parties out of the general rule.[2]* The fact that the owner of the equitable interest who sets up the defence of purchase without notice, may be in possession, and has a right to call for the legal estate, does not vary the rule.[3] The assignee of a chose in action not assignable at law, cannot set up the defence of purchase for value without notice as against equities which attached to the security in the hands of the assignor.[4] The person liable to the demand may so act as to create against himself an equity preventing the application of the rule. There may be such dealings between the assignee and the party liable originally as to preclude him from insisting as against the assignee upon rights which he might have claimed as against the assignor; but, as a general rule, a person who buys a chose in action, which can only be put in suit in the name of the original holder, takes subject to the equities which affect the assignor, even although he be a *bonâ fide* purchaser without notice.[5] Where, accordingly, a man bought in the market, in the ordinary course of business, debentures which had been issued in fraud of a company, the

[1] Att.-Gen. *v.* Flint, 4 Ha. 156.

[2] Frazer *v.* Jones, 17 L. J. Ch. 355; Rice *v.* Rice, 2 Drew. 78.

[3] Philipps *v.* Philipps, 31 L. J. Ch. 321.

[4] Coles *v.* Jones, 2 Vern. 692; Turton *v.* Benson, 1 P. Wms. 496; Cator *v.* Burke, 1 Bro. C. C. 434; Priddy *v.* Rose, 3 Mer. 86; Mangles *v.* Dixon, 3 H. L. 702; Cockell *v.* Taylor, 15 Beav. 103; Morris *v.* Livie, 1 Y. & C. C. C. 380; Smith *v.* Parkes, 16 Beav. 115; Clack *v.* Holland, 19 Beav. 262; Stackhouse *v.* Countess of Jersey, 1 J. & H. 721; Athenæum Life Assurance Society *v.* Pooley, 3 D. & J. 294.

[5] How *v.* Weldon, 2 Ves. 516; Cockell *v.* Taylor, 15 Beav. 103; Athenæum Life Assurance Society *v.* Pooley, 3 D. & J. 294.

* Halett *v.* Collins, 10 How. 174; Boone *v.* Chiles, 10 Pet. 177; Gallion, *v.* McCaslin, 1 Blackf. 191; Craig *v.* Leiper, 2 Yerg. 193; Napier *v.* Elam, 6 Yerg. 108.

fact that the transfer of the debentures had been registered in the books of the company, and interest had been paid on them, and that the holder was a *bonâ fide* purchaser without notice, was held not to affect the application of the rule, and the holder of them was restrained from suing at law upon them.[1] The rule that a man who purchases a chose in action takes it subject to the equities, which attach to it in the hands of the assignor, applies even where the person himself who asserts the equity has created the interest under which the assignee claims it.[2] Where, accordingly, A mortgaged a fund in court to B, and afterwards joined B in a sub-mortgage to C, and it was decided that the mortgage to B was fraudulent and void, it was held void as to C, and that neither A's concurrence in the first or second mortgage prevented him from insisting on the invalidity of the transaction, he not being aware of his rights.[3]

The rule that a *bonâ fide* purchaser, without notice, may buy in, or obtain for his protection against other claimants, an outstanding legal estate, or other legal advantage, is the foundation of the equitable doctrine of tacking, as it is technically called, that is, uniting securities given at different times, so as to prevent any intermediate purchaser from claiming a title to redeem, or otherwise to discharge one lien which is prior in date, without redeeming or discharging the other liens also which are subsequent to his own title.[4] * Thus, if a

[1] *Ib.* Comp. Thorndike *v.* Hunt, 3 D. & J. 568; Ashwin *v.* Burton, 9 Jur. N. S. 319; Hulett's Case, 2 J. & H. 306; Woolhams *v.* Anglo-Australian, &c., Co., 3 Giff. 238, 2 D. J. & S. 168; Dodds *v.* Hills, 2 H. & M. 424. See also Pinkett *v.* Wright, 2 Ha. 137, S. C. on appeal; Murray *v.* Pinkett, 12 Cl. & Fin. 780, Moore *v.* Jervis, 2 Coll. 60; Morris *v.* Livie, 1 Y. & C. C. C. 380; Barnett *v.* Sheffield, 1 D. M. & G. 371; Stackhouse *v.* Countess of Jersey, 1 J. & H. 721.

[2] Cockell *v.* Taylor, 15 Beav. 119.

[3] *Ib.* 103.

[4] Jeremy's Eq. Jur. b. I, c. ii, § 1; Story's Eq. Jur. 412.

* The doctrine of tacking is never allowed against incumbrances which are recorded. Averill *v.* Guthrie, 8 Dana, 82; Osborn *v.* Carr, 12 Ct. 196; St. Andrew's Church *v.* Tomkins, 7 Johns. Ch. 14.

third mortgagee, without notice of a second mortgagee at the time when he lent his money, should purchase in the first mortgage, by which he would acquire the legal title, the second mortgagee cannot redeem the first mortgage without redeeming the third mortgage also. It is immaterial that the third mortgagee may have had notice of the second mortgage at the time of purchasing in the first mortgage, provided he had no such notice at the time he advanced his money.[1] The absence of notice at the time of the advance is the ground of the equity.[2] The legal estate, accordingly, of the first mortgagee will not protect subsequent interests purchased with notice of *mesne* incumbrances. A man purchasing an equity of redemption, cannot set up a prior mortgage of his own, or a mortgage which he has got in against subsequent incumbrances of which he had notice.[3]

SECTION VII.—REMEDIES.

REMEDIES AT LAW.

An action on the case for damages in the nature of a writ of deceit, lies at law against a man for making a false and fraudulent representation, whereby another is induced to enter into a transaction, and by so doing sustains damage.[4] * If the representation be false, it is immaterial that it may have been made without any fraudulent intent, or that the party who

[1] March *v.* Lee, 1 Ch. Ca. 162; Morrett *v.* Paske, 2 Atk. 52; Wortley *v.* Birkhead, 2 Ves. 571; Lacey *v.* Ingle, 2 Ph. 419; Rooper *v.* Harrison, 2 K. & J. 86; Bates *v.* Johnson, John. 304. See Lloyd *v.* Attwood, 3 D. & J. 614.

[2] Brace *v.* Duchess of Marlborough, 2 P. Wms. 491; Hopkinson *v.* Rolt, 9 H. L. 514.

[3] Toulmin *v.* Steere, 3 Mer. 224.

[4] Pasley *v.* Freeman, 3 T. R. 52, *supra*, p. 53.

* Young *v.* Hall, 4 Geo. 95; Irwin *v.* Sherrill, 1 Taylor, 1; Patten *v.* Gurney, 13 Mass. 182; Weatherford *v.* Fishback, 3 Scam. 170; Fenimore *v.* United States, 3 Dallas, 357.

made it may have derived no benefit from it.[1]* The principle of law is, that fraud accompanied by damage is in all cases a good cause of action.[2] A representation, however, honestly believed to be true by the party making it, is not, independently of a duty cast on him to know the truth, a good cause of action, although it may prove to be untrue.[3] †

If the transaction be a contract, the rule of law with

[1] Polhill *v.* Walter, 3 B. & A. 114; Foster *v.* Charles, 7 Bing, 106, *supra*, pp. 55, 56.

[2] Pasley *v.* Freeman, 3 T. R. 52; Polhill *v.* Walter, 3 B. & A. 114; Foster *v.* Charles, 7 Bing. 106.

[3] Haycraft *v.* Creasy, 2 East, 92; Thom *v.* Bigland, 8 Exch. 726; Ormrod *v.* Huth, 14 M. & W. 651.

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* Smith *v.* Mitchell, 6 Geo. 458; Stiles *v.* White, 11 Met. 356; Young *v.* Hall, 4 Geo. 95; Hart *v.* Talmadge, 2 Day, 381; Clopton *v.* Cogart, 13 Smed. & Mar. 363; Collins *v.* Dennison, 12 Met. 543; West *v.* Emery, 17 Vt. 583; Boyd *v.* Brown, 6 Barr, 310; Munson *v.* Gairdner, 3 Brevard, 31.

† Boyd *v.* Brown, 6 Barr, 316; Weeks *v.* Burton, 7 Vt. 67; Young *v.* Covell, 8 Johns. 25; Stone *v.* Denny, 4 Met. 151; Tryon *v.* Whitmarsh, 1 Met. 1; Russell *v.* Clark, 7 Cranch, 62.

Fraud and injury must concur to furnish ground for judicial action. A mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognizance. Clark *v.* White, 12 Pet. 178; Garrow *v.* Davis, 15 How. 272; Morgan *v.* Bliss, 2 Mass. 111; Farrar *v.* Alston, 1 Dev. 69.

If a claim is made for fraud, the representations must not only be false, but false to the knowledge of the party making them. Marshall *v.* Gray, 57 Barb. 414; Pettigrew *v.* Chellis, 41 N. H. 95; Staines *v.* Shore, 16 Penn, 200; Bendurant *v.* Crawford, 22 Iowa, 40; Morton *v.* Scull, 23 Ark. 289; King *v.* Eagle, 10 Allen, 548; Taylor *v.* Frost, 39 Miss. 528; Allen *v.* Wanumaker, 2 Vroom, 370; Bond *v.* Clark, 35 Vt. 577; Zehner *v.* Kipler, 16 Ind. 290; Peers *v.* Davis, 29 Mo. 184; Holmes *v.* Clark, 10 Iowa, 423.

If a person, with intent to deceive and defraud, asserts a fact as existing of his own knowledge, when he has no knowledge upon the subject, he is liable to the party injured for the falsehood. In that case, there is guilty knowledge, for he claims to know, and asserts what he does not know. Atwood *v.* Wright, 29 Ala. 346; Bennett v. Judson, 21 N. Y. 238; Craig *v.* Ward, 36 Barb. 377; Sharp *v.* New York, 40 Barb. 256.

An action may be sustained for a misrepresentation by which a creditor has been induced to allow the Statute of Limitations to bar his claim. Marshall *v.* Buchanan, 35 Cal. 264.

In cases of fraud, it is immaterial whether any or what covenants are

respect to false and fraudulent representation applies, notwithstanding the contract may have been in writing, and notwithstanding the representations, may be no part of the terms of the written contract.[1]

To found an action of deceit, the fraud must be a personal one on the part of the person making the representation, or some fraud which another person has impliedly authorized him to be guilty of. An action of deceit cannot be brought against a principal for the fraudulent representations of his agent, unless he has impliedly authorized him to make the representations.[2] An incorporated company cannot, therefore, in its corporate capacity, be called upon to answer in an action of deceit for false representations made by its directors, unless they have authorized the representations. The company cannot be sued as wrong-doers by imputing to them the misconduct of those whom they have employed. An action of deceit may be maintained against the directors personally; but not against the company.[3]

A purchaser may, after conveyance, bring an action in the case for a fraudulent misrepresentation of the property,[4] * or

[1] Attwood *v.* Small, You. 407, *per* Lord Lyndhurst.

[2] New Brunswick &c. Railway *v.* Conybeare, 9 H. L. 711; Henderson *v.* Lacon, L. R. 5, Eq. 262.

[3] Western Bank of Scotland *v.* Addie, L. R. 1, Sc. App. Ca. 162; Henderson *v.* Lacon, L. R. 5, Eq. 262.

[4] Dobell *v.* Stevens, 3 B. & C. 623; Mummery *v.* Paul, 1 C. B. 316, Fuller *v.* Wilson, 3 Q. B. 58, 68; Gerhard *v.* Bates, 2 E. & B. 476.

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contained in the deed. Wardell *v.* Fosdick, 13 Johns. 325; Shackleford *v.* Handy, 1 A. K. Marsh. 495; Bostwick *v.* Lewis, 1 Day, 250; Cravens *v.* Grant, 2 Mon. 117; s. c. 4 Mon. 126.

The simple fact of making representations in regard to the credit of another, which turn out to be untrue, unconnected with a fraudulent design, is not sufficient to support an action. Lord *v.* Goddard, 13 How. 198; Lord *v.* Colley, 6 N. H. 99; Young *v.* Covell, 8 Johns. 25; Williams *v.* Wood, 14 Johns. 126; Fooks *v.* Waples, 1 Harring. 131; Hopper *v.* Lisk, 1 Smith, 102; Upton *v.* Vail, 6 Johns. 181; Allen *v.* Addington, 7 Wend. 1.

* Mallory *v.* Leach, 35 Vt. 156; Kelly *v.* Pember, 35 Vt. 183; Gifford *v.* Carvill, 29 Cal. 583; Love *v.* Oldham, 22 Ind. 51.

the title;[1] or may recover the purchase-money, if the circumstances of the case entitle him to rescind the contract.[2] *

[1] Pillmore *v.* Hood, 5 Bing. N. C. 97. [2] Early *v.* Garrett, 4 M. & R. 687. See Dart, V. & P. 612–614.

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* Pearsoll *v.* Chapin, 44 Penn. 9; Shackleford *v.* Handy, 1 A. K. Marsh. 495.

Fraud in a contract is no bar to an action upon a contract, unless there is a rescission or offer to rescind the contract within a reasonable time after the discovery of the fraud. Benton *v.* Stewart, 3 Wend. 236; Bain *v.* Wilson, 1 J. J. Marsh. 202.

The defendant in case of fraud is entitled to a deduction of an amount equal to the difference between the value of the property, on the supposition of its corresponding with the representations and its real value. Ward *v.* Reynolds, 32 Ala. 384; Hinckley *v.* Hendrickson, 5 McLean, 170; Bischof *v.* Lucas, 6 Ind. 26; Smith *v.* Smith, 30 Vt. 139; Weinier *v.* Clement, 37 Penn. 147; Cecil *v.* Spurger, 32 Mo. 462; Huckabee *v.* Hutter, 10 Ala. 657; Groff *v.* Hansel, 33 Md. 161; Withers *v.* Greene, 9 How. 230; Berker *v.* Vrooman, 13 Johns. 302; Spalding *v.* Vandercook, 2 Wend. 432.

In an action of ejectment, replevin, trover, assumpsit, or other forms of action, for the purpose of recovering back anything, as on the rescission of a contract, the very first thing to be done, after showing that the plaintiff parted with the thing in pursuance of the contract alleged, is to show that the plaintiff has rescinded the contract by doing, or offering to do, all that is necessary and reasonably possible to restore the parties to the condition in which they were before the contract, and thus to show that he had good ground to rescind it. Pearsoll *v.* Chapin, 44 Penn. 9; Rutter *v.* Blake, 2 H. & J. 353; Norton *v.* Young, 3 Greenl. 30; Sanborn *v.* Osgood, 16 N. H. 112; Weeks *v.* Robie, 42 N. H. 316; Gulth *v.* White, 35 Barb. 76; Wasson *v.* Bovet, 1 Denio, 69; Thayer *v.* Turner, 8 Met. 552; Ball *v.* Lively, 4 Dana, 371; Kinney *v.* Kierman, 2 Lans. 46.

If the thing the consideration of which is sought to be recovered is entirely worthless, there need be no tender of a return. Whenever the question of restoration arises, it is an equitable question, and is to be dealt with on equitable principles. Babcock *v.* Case, 61 Penn. 427; Mahone *v.* Reeves, 11 Ala. 345; Smith *v.* Smith, 30 Vt. 139; Phelan *v.* Crosby, 2 Gill. 462.

A party can not excuse an omission to return the note of a third person by offering to prove that the maker is insolvent, and the note on that account worthless. Cook *v.* Gilman, 34 N. H. 556; Cushing *v.* Wyman, 38 Me. 589; Baker *v.* Robbins, 2 Denio, 136.

Leaving a deed of reconveyance with the clerk of the court in which an action is pending, upon the note given as the consideration for the property, is a sufficient restoration. Concord Bank *v.* Gregg, 14 N. H. 331.

If a contract for the sale or purchase of goods or chattels be induced by false and fraudulent representations on the part of the other party to the contract, the party defrauded may rescind or avoid the contract, and recover back what he has paid or sold,[1] unless he has, after discovery of the fraud, acted upon and treated the contract as binding.[2] The right to rescind is not afterwards revived by the discovery of another incident in the same fraud.[3] Nor can a contract be rescinded if the circumstances have in the meantime so far changed that the parties cannot be restored to the position in which they

[1] Gompertz *v.* Denton, 1 Cr. & M. 207; Load *v.* Green, 15 M. & W. 220.

[2] Campbell *v.* Fleming, 1 A. & E. 40; Selway *v.* Fogg, 5 M. & W. 86.

[3] *Ib.*

If the vendor has taken the vendee's own notes, an offer to return them at the trial is sufficient. They need not be surrendered before bringing suit. Thurston *v.* Blanchard, 22 Pick. 18; Coghill *v.* Boring, 15 Cal. 213; Duval *v.* Mowry, 6 R. I. 479; Nichols *v.* Michaels, 23 N. Y. 264; Armstrong *v.* Tufts, 6 Barb. 432; Keutgen *v.* Parks, 2 Sandf. 60; Hathorn *v.* Hodges, 28 N. Y. 486; Armstrong *v.* Cushing, 43 Barb. 350; White *v.* Dodds, 18 Abb. 250; Stevens *v.* Hyde, 32 Barb. 171; Pequeno *v.* Taylor, 38 Barb. 375.

In case of a sale on credit, if there is any fraud on the part of the purchaser, which avoids the special contract, the vendor may disregard the terms of credit, and bring an action immediately for the goods. Bank *v.* Gore, 15 Mass. 79; Wilson *v.* Fovet, 6 Johns. 110; Roth *v.* Palmer, 27 Barb. 652; Kayser *v.* Sichel, 34 Barb. 84; French *v.* White, 5 Duer, 256; Bliss *v.* Cottle, 32 Barb. 322; Wigand *v* Sichel, 3 Keyes, 120.

A fraudulent representation of the quality and value of the thing sold forms no defense in a suit on a specialty. The fraud that may be given in evidence, under the plea of *non est factum*, must be confined to fraud that relates to the execution of the instrument; as, if a deed be fraudulently misread, and is executed under that imposition, or where there is a fraudulent substitution of one deed for another, and the party's signature is obtained to a deed which he did not intend to execute. Dorr *v.* Munsell, 13 Johns. 430; Franchot *v.* Leach, 5 Cow. 506; Champion *v.* White, 5 Cow. 509; Burrows *v.* Alter, 7 Mo. 424; Mordecai *v.* Tankersley, 1 Ala. 100; Anderson *v.* Johnson, 3 Sandf. 1; McKnight *v.* Kellett, 9 Geo. 532; Holly *v.* Young, 27 Ala. 203. *Contra*, Hazard *v.* Irwin, 18 Pick. 95; Hoitt *v.* Holcomb, 23 N. H. 535; Herrin *v.* Libbey, 36 Me. 350.

Where the defense set up is fraud in the contract of sale, apart from any defect of title, and independent of it, the defense may be made to an

stood before or at the time of the contract.[1] * The effect of the avoidance of an agreement on the ground of fraud, is to place the parties in the same position as if it had never been made; and all rights which are transferred or created by the agreement, are revested or discharged by the avoidance. If, when it is avoided, nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same, as if it had been void from the beginning; but if any alteration has taken place, their rights and remedies are subject to the effect of that alteration.[2] A contract, though induced by fraud, cannot be avoided, if the rights of an innocent vendee have in the meantime intervened.[3] If before disaffirmance, the goods or chattels have been resold or transferred, either in whole or in part, to an innocent vendee, the title of such vendee is good against the original vendor.[4] So, also, where a negotiable instrument is obtained by fraud, the negotiation of the instrument gives a valid title to a transferee, who takes

[1] Clarke *v.* Dickson, El. Bl. & El. 148.

[2] Queen *v.* Saddlers' Co., 10 H. L. 420, *per* Blackburn, J. See Feret *v.* Hill, 15 C. B. 207.

[3] *Supra*, pp. 49, 312.

[4] White *v.* Garden, 10 C. B. 919; Kingsford *v.* Merry, 11 Exch. 579, 1 H. & N. 503.

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action for the price of the land, although the defendant retains possession. Anderson *v.* Hill, 12 Smed. & Mar. 679; Concord Bank *v.* Gregg, 14 N. H. 331; Forster *v.* Gillam, 13 Penn. 340; Gordon *v.* Parmelee, 2 Allen, 212; Whittier *v.* Vose, 4 Shep. 403; Whitney *v.* Allaire, 4 Denio, 554. *Contra*, Cullam *v.* Branch Bank, 4 Ala. 21; Christian *v.* Scott, 1 Stew. 490; Stone *v.* Gover, 1 Ala. 287.

An action for deceit will lie for false representations made upon the sale of land, and the fact that the deed does not contain a warranty covering the ground of the representation is immaterial. Coon *v.* Atwell, 46 N. H. 510; Whitney *v.* Allaire, 1 Comst. 305; Culver *v.* Avery, 7 Wend. 380; Wade *v.* Sherman, 2 Bibb, 583.

* Denner *v.* Smith, 32 Vt. 1; Poor *v.* Woodburn, 25 Vt. 234; Buchanan *v.* Horney, 12 Ill. 336; Shaw *v.* Barnhart, 17 Ind. 183; Blen *v.* Bear River &c. Co., 20 Cal. 602; Jemison *v.* Woodruff, 34 Ala. 143; Kinney *v.* Kierman, 2 Lans. 492; Pierce *v.* Wilson, 34 Ala. 596.

it without notice of the fraud.[1] Upon the same principle, where a man has been induced to become a shareholder of a company, through the fraud of the company, he cannot by avoiding his contract with the company, and repudiating his shares, evade his liability to creditors of the company, who dealt with the company whilst he remained a shareholder, and who were not parties to the fraud.[2] But, although it may no longer be open to the party defrauded, from the change of circumstances which have taken place in the meantime, to avoid the contract upon the discovery of the fraud, he has a remedy by action of deceit for damages against the party by whose misrepresentations he has been misled to his injury.[3]

The party defrauded may, instead of rescinding the contract, stand to the bargain, even after he has discovered the fraud, and recover damages for the fraud, or he may recoup in damages if sued by the vendor for the price. The affirmance of a contract by the vendee after discovery of the fraud, merely extinguishes his right to rescind. His other remedies remain unimpaired.[4] *

If a vendee discover that he is insolvent, and that it is not in his power to pay for the goods, the courts have allowed him to rescind the contract, and return the goods to the seller, with his assent, provided he did so before the contract was consummated by an absolute delivery, and acceptance, and provided it was done in good faith, and not with the colorable design of favoring a particular creditor. He cannot rescind the contract

[1] Barber *v.* Richards, 6 Exch. 63; May *v.* Chapman, 16 M. & W. 355.

[2] Henderson *v.* Royal British Bank, 7 E. & B. 356; Powis *v.* Harding, 1 C. B. N. S. 533; Oakes *v.* Turquand, L. R. 2, App. Ca. 325.

[3] Clarke *v.* Dickson, El. Bl. & El. 149; Western Bank of Scotland *v.* Addie, L. R. 1, Sc. App. Ca. 167.

[4] Whitney *v.* Allaire, 4 Denio (Amer.), 554. See Van Epps *v.* Harrison, 5 Hill (Amer.), 68; 2 Kent's Comm. 480; Bédarride sur Dol., vol. I, p. 248.

* Peck *v.* Brewer, 48 Ill. 55; Horem *v.* Libbey, 36 Me. 350; Whitney *v.* Allaire, 1 Comst. 305; Weimer *v.* Clement, 37 Penn. 147; Herrin *v.* Libbey, 36 Me. 350.

after the transit has ceased, and the goods have been actually received in his possession, and the rights of creditors have attached.[1]

If goods are obtained from the vendor by means of a fraudulent misrepresentation of the vendee as to his situation and circumstances, the vendor may elect to affirm the sale, and sue for the price, or to avoid the sale and follow the goods, or the proceeds thereof, into the hands of a third person who has received them, without paying any new consideration.* But if he proceeds to judgment against the vendee after he is apprised of the fraud, his election is determined, and he cannot afterward follow the goods into the hands of a third person on the ground of fraud.[2]

If the party by whose misrepresentation a transaction has been induced is not a party to the transaction, the transaction stands good, and cannot be avoided unless one of the parties to the transaction was implicated in the fraud.[3] The party defrauded has his remedy by action of deceit for damages against the party who made the misrepresentations.

If a specific chattel be sold under a warranty, and the property has passed to the purchaser, he cannot return the chattel and claim back what he has paid, or resist an action for the price, on the ground of breach of warranty, unless there was a condition to that effect in the contract; but must have recourse to an action for damages in respect of the breach of warranty.[4] The case, however, is different if fraud can be shown. If a

[1] Barnes *v.* Freeland, 6 T. R. 80; Richardson *v.* Goss, 3 B. & P. 119; Neate *v.* Ball, 2 East, 117; Dixon *v.* Baldwin, 5 *ib.* 175; Salte *v.* Field, 5 T. R. 211.

[2] Lloyd *v.* Brewster, 4 Paige (Amer.), 537; Bank of Beloit *v.* Beale, 7 Tiff. (Amer.), 475.

[3] Masters *v.* Ibberson, 8 C. B. 100.

[4] Street *v.* Blay, 2 B. & Ad. 462; Dawson *v.* Collis, 10 C. B. 523; Behn *v.* Burness, 3 B. & S. 755.

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* Powell *v.* Bradley, 9 G. & J. 220; Henshaw *v.* Bryant, 4 Scam. 97; Bradberry *v.* Keas, 5 J. J. Marsh. 446.

representation be made fraudulently, for the purpose of inducing a party to enter into a contract, the party defrauded is entitled to avoid the contract on the ground of fraud, and may recover back the price, notwithstanding the warranty of the same matter.[1]

REMEDIES IN EQUITY.

The common law, however, has not provided the courts of ordinary jurisdiction with the means of enforcing the specific restitution or recovery of property in the ample manner that was afforded by the Roman law. If the execution of a deed or other instrument had been obtained by fraud, or under such circumstances as to require that it should be cancelled and delivered up, the courts of common law were incompetent to afford such a remedy, so that, at law, the party defrauded might be left for an indefinite length of time liable to have the instrument set up against him, when possibly the evidence of the fraud might have become unattainable. The necessity, therefore, for the extraordinary interference of the Court of Chancery, to afford an adequate remedy, became manifest at a very early date.*

The jurisdiction of the Court of Chancery, by way of rescinding transactions on the ground of fraud, is exercised either for the purpose of cancelling executory agreements or of setting aside executed agreements, deeds, or conveyances. In the

[1] Street *v.* Blay, 2 B. & Ad. 462; Murray *v.* Mann, 2 Exch. 538.

* The fraud, which is the ground for relief against a contract, is fraud at the time of the execution of the instrument. Chesterman *v.* Gardner, 5 Johns. Ch. 29.

When a suit has been instituted both at law and in equity, the complainant can not be required to elect between the two actions before the filing of the answer. Abel *v.* Cave, 3 B. Mon. 159; Freeman *v.* Staats, 4 Halst. Ch 814.

case of executory agreements, the equity of rescission is founded on the injustice of leaving a man exposed, it may be for an indefinite time, to have a fraudulent instrument set up against him. It is not enough that he should be able to plead fraud in bar to an action, whenever an action is brought. Complete justice, as understood by courts of equity, requires that the instrument should be delivered up and cancelled. In the case of executed agreements, deeds, or conveyances, the equity of rescission is founded on the injustice of permitting a man who has fraudulently appropriated the property of others to benefit by the fruits of his iniquity. Though pecuniary damages to be obtained at law might be, in some sense, a remedy, complete justice, as understood by courts of equity, requires that the transaction should be set aside and avoided.[1]

If a contract has been induced by false representations, or a transaction is in any way tainted by fraud, and the defrauding party is a party to the transaction, the transaction will, even after conveyance and payment of the purchase-moneys, be set aside, if the nature of the case and the condition of the parties will admit of it;[2] or the defrauding party will be compelled to make his representation good.[3]* A man whose in-

[1] Evans *v.* Bicknell, 6 Ves. 182; Blair *v.* Bromley, 2 Ph. 360.

[2] Edwards *v.* M'Cleay, Coop. 308, 312, 2 Sw. 287; Berry *v.* Armitstead, 2 Keen, 221; Lovell *v.* Hicks, 2 Y. & C. 46; Pulsford *v.* Richards, 17 Beav. 87, 96; Bell's Case, 22 Beav. 35; Ayre's Case, 25 Beav. 515; Slim *v.* Croucher, 1 D. F. & J. 518.

[3] Burrowes *v.* Lock, 10 Ves. 475; Pulsford *v.* Richards, 17 Beav. 87, 96; Att.-Gen. *v.* Cox, 3 H. L. 240. See Ellis *v.* Colman, 25 Beav. 673.

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* Bacon *v.* Bronson, 7 Johns. Ch. 194; Bean *v.* Herrick, 12 Me. 262; Pollard *v.* Rogers, 4 Call, 239; Campbell *v.* Whittingham, 5 J. J. Marsh. 96.

Contracts in regard to personal, as well as real property, may be rescinded. Bradberry *v.* Keas, 5 J. J. Marsh. 446; Rumph *v.* Abercrombie, 12 Ala. 64; Taymon *v.* Mitchell, 1 Md. Ch. 496.

A purchaser in the undisturbed possession of land will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation. In such case he must

terest has been affected by misrepresentation, has an equity to be placed in the same situation as if the fact represented were true.[1] If there is nothing in the nature of the case or the condition of the parties to prevent the court from getting the transaction set aside, the party defrauded is entitled to have it set aside, and not merely to have the representation made good.[2] It is enough, in order to entitle him to have a transaction set aside, to show a fraudulent representation as to any part of that which induced him to enter into the contract which he seeks to rescind.[3]

The rule being that he who seeks equity must do equity in matters arising out of the transaction in respect of which he

[1] Blair *v.* Bromley, 2 Ph. 360.
[2] Rawlins *v.* Wickham, 3 D. & J. 322.
[3] Kennedy *v.* Panama, &c. Co. L. R. 2, Q. B. 587.

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seek his remedy at law upon the covenants If there is no fraud and no covenants to secure title, he is without remedy; as the vendor selling in good faith is not responsible for the goodness of his title beyond the extent of his covenants in the deed. Patton *v.* Taylor, 7 How. 133; Abbott *v.* Allen, 2 Johns. Ch. 522; Davis *v.* Bowland, 2 J. J. Marsh. 27; Noonan *v.* Lee, 2 Blackf. 499.

The question presented by an application for a rescission is different from that presented in an application for specific performance. Applications to rescind must abide the result one way or the other of the stern proof of fraud. In the absence of all proof of *suggestio falsi* or *suppressio veri*, parties must abide by their contracts. Maney *v.* Eater, 3 Humph. 347.

If the fraud relates to the title to property, it may be removed by a tender of a good and valid deed at any time before decree in the absence of proof of special damage Boyce *v.* Grundy, 3 Pet. 210; Davidson *v.* Moss, 5 How. (Miss.) 673; Hunt *v.* McConnell, 1 Mon 222; Wickliffe *v.* Lee, 6 B. Mon. 543; Evans *v.* Bolling, 5 Ala. 550; Ayres *v.* Mitchell, 3 Smed. & Mar. 683.

If the fraud relates to the quantity of land, the purchaser may be relieved from paying for the deficiency. M'Coun *v.* Delaney, 3 Bibb, 46; Jopping *v.* Dorley, 1 Yerg. 289.

If the fraud consists in puffing at an auction sale, the excess may be decreed to be refunded. Veazie *v.* Williams, 8 How. 134.

If the defect of title relates only to a small portion of the property

seeks relief,[1] the court will not rescind a transaction unless the party against whom relief is sought can be remitted to the position in which he stood antecedently to or at the time of the transaction.[2]* On setting aside a transaction, the court proceeds on the ground that, as the transaction never ought to

[1] Hanson *v.* Keating, 4 Ha. 1; Neesom *v.* Clarkson, *ib.* 101; Sober *v.* Kemp, 6 Ha. 160; Wilkinson *v.* Fowkes, 9 Ha. 593; Gibson *v.* Goldsmid, 5 D. M. & G. 757.

[2] Hanson *v.* Keating, 4 Ha. 1; Beaden *v.* King, 9 Ha. 532; Savery *v.* King, 5 H. L. 627; Western Bank of Scotland *v.* Addie, L. R. 1, Sc. App. Ca. 162.

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which did not constitute an inducement to the purchaser, it is more equitable to decree compensation than to rescind the contract. Buck *v.* McCaughtry, 5 Mon 216; Tomlinson *v.* Savage, 6 Ired. Eq. 430.

Equity will not decree compensation for fraud in a sale when the vendee retains the property. The remedy is at law. Stone *v.* Ramsay, 4 Mon. 236; Cocke *v.* Hardin, 6 Litt. 374.

The contract may be rescinded for fraud in relation to the title, although there is a covenant of warranty. Woods *v.* North, 6 Humph. 309; English *v.* Benwood, 25 Miss. 167; Prout *v.* Roberts, 32 Ala. 427; Moreland *v.* Atchinson, 19 Tex. 303.

It is not necessary that there should be an eviction under an outstanding title. Parkham *v.* Randolph, 4 How. (Miss.) 435; Napier *v.* Elam, 6 Yerg. 108.

A vendee can not buy in an outstanding title, and assert it against the vendor. All he is entitled to is a repayment of the money paid out. Hardeman *v.* Conan, 10 Smed. & Mar. 486; Westall *v.* Austin, 5 Ired. Eq. 1.

Abandonment of possession is not a necessary prerequisite to entitle the party to recover. Young *v.* Harris, 2 Ala. 108; Coffee *v.* Newsom, 2 Kelly, 442; Foster *v.* Gersett, 29 Ala. 393; Garner *v.* Leorett, 32 Ala. 410.

The vendee, upon rescission, must offer to return the property. More *v.* Smedburgh, 8 Paige, 600; Duncan *v* Jeter, 5 Ala. 604; Abel *v.* Cave, 9 B. Mon. 159; Bruen *v.* Hone, 2 Barb. 586; Matta *v.* Henderson, 14 La. An. 473.

* Garland *v.* Bowling, 1 Hemp. 710; Johnson *v.* Jones, 13 Smed. & Mar. 580; Pintard *v.* Martin, 1 Smed. & Mar. Ch. 126; Cunningham *v.* Fithian, 2 Gilman, 650; Carroll *v.* Rice, 1 Walk. Ch. 373.

The fact that the parties cannot be put precisely in *statu quo* as to the subject-matter of the contract will not preclude a decree for the rescission of the contract. If it would, an executed contract never could be rescinded by a decree of a court, for the parties never could be thus placed. Gatling *v.* Newell, 9 Ind. 572.

have taken place, the rights of the parties are, as far as possible, to be placed in the same situation in which they would have stood if there had never been any such transaction.[1] If the party defrauded has, by his own act, put it out of his power to replace the party against whom relief is sought in the position in which he stood at the time of the transaction,[2] or if third parties, without notice of the fraud, have in the meantime acquired rights and interests in the matter,[3] there can be no rescission; and nothing remains to the party defrauded but a reparation in damages.[4] Rescission of a transaction or contract cannot in general be had, unless the party seeking it is able himself to rescind it *in toto*.[5] * Under special circumstances, a transaction may be partially rescinded; but the court will never adopt such a course unless it can see clearly that no injustice will be done.[6] If the transaction is severable, inability to rescind it as to part is not fatal to the right to rescind it as to another part.[7] The fact, for instance, that a man who has

[1] Bellamy *v.* Sabine, 2 Ph. 425.
[2] Nicoli's Case, 3 D. & J. 387; Mixer's Case, 4 D. & J. 586.
[3] Scholfield *v.* Templer, 4 D. & J. 429; Oakes *v.* Turquand, L. R. 2, App. Ca. 375.
[4] Mixer's Case, 4 D. & J. 586.
[5] Hanson *v.* Keating, 4 Ha. 1; Clarke *v.* Dickson, El. Bl. & El. 148; Maturin *v.* Tredennick, 12 W. R. 740; Western Bank of Scotland *v.* Addie, L. R. 1, Sc. App. Ca. 162, *supra*.
[6] Bradley *v.* Bosley, 1 Barb. (Amer.), 125.
[7] Maturin *v.* Tredennick, 12 W. R. 740.

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* Golden *v.* Maupin, 2 J. J. Marsh. 236; Clay *v.* Turner, 3 Bibb, 52.

The general rule is, that where the whole contract is contaminated with fraud, and the parties can be placed in *statu quo*, the contract may be rescinded. Where that can not be done, or where the injured party is unwilling to have it done, then the party aggrieved must seek his redress exclusively at law. Caldwell *v.* Caldwell, 1 J. J. Marsh. 53; Pintard *v.* Martin, 1 Smed. & Mar. Ch. 126.

A vendee may have the contract set aside, or compensation for a defect fraudulently concealed from him. The courts will not rescind a part only of an entire contract. Joplin *v.* Dooley, 1 Yerg. 289; Glassell *v.* Thomas, 3 Leigh, 113; Hope *v.* Evans, 1 Smed. & Mar. Ch. 195; Step *v.* Alkire, 2 A. K. Marsh. 257; Prewitt *v.* Graves, 5 J. J. Marsh. 114.

been induced by fraud to purchase shares in a particular company, may have sold some of the shares before discovering the fraud, will not deprive him of the right to have the transaction as to the remaining shares rescinded[1]* Nor is the inability of a man to rescind a transaction as a whole fatal to his right of rescission, if his inability to do so is attributable to the party against whom he seeks relief. If the latter has entangled and complicated the subject of the transaction in such a manner as to render it impossible that he should be restored, the party defrauded may, on doing whatever it is in his power to do, have the transaction rescinded.[2] So also, it is no objection to the rescission of a transaction for the purchase of shares obtained by fraud that the shares have fallen in value since the date of the transaction.[3]† Nor is a man, if the property is of a perishable nature, bound to keep it in a state of preservation until bill filed.[4]‡ His only duty is to do nothing with the property after the bill filed; and in cases where damage is likely to occur, and might be prevented, he ought, perhaps, to give intimation to the defendant, leaving him to do what he pleased.[5] A party seeking to set aside a sale of shares, is not bound to pay calls on them to prevent forfeiture after filing his bill.[6] It is not fatal to his right of rescission that some of the shares may have been forfeited for non-payment of calls since bill filed.[7]

A sale, however, of several kinds of shares in one transaction cannot be set aside for misrepresentation, if the person seeking relief is unable to restore all the shares he has taken.[8]

[1] Maturin *v.* Tredennick, 12 W. R. 740.
[2] Masson *v.* Bovet, 1 Denio (Amer.), 69.
[3] Blake *v.* Mowatt, 21 Beav. 613.
[4] Maturin *v.* Tredennick, 2 N. R. 514; 4 N. R. 15; 12 W. R. 740.
[5] *Ib.*
[6] *Ib.*
[7] *Ib.*
[8] *Ib.*

* Shackleford *v* Handy, 1 A. K. Marsh. 495.
† Veazie *v.* Williams, 8 How. 134.
‡ Scott *v.* Perrin, 4 Bibb, 360.

Whether the change of a company from an incorporated into a corporate one, for the mere purpose of more conveniently winding up its affairs, renders restitution impracticable, is a difficult question. In Clarke *v.* Dickson,[1] a mining company was, with the plaintiff's consent, registered as a company with limited liability, and was wound up under the Winding-up Act. In an action for money had and received, to recover back the amount paid for the purchase of the shares, the court held the action not maintainable. Erle, C. J., said: "He has changed the nature of the article; the shares he received were shares in a company, on the cost-book principle; the plaintiff offers to restore them after he has converted them into shares in a joint-stock company." The cases show that there is no distinction between cases where the question arises between an alleged shareholder and the creditors of a company, and when it arises between a company and a person who has fraudulently been induced to become a shareholder.[2] In Henderson *v.* Lacon,[3] however, Wood, L. J., held that a man who had been induced by the false representations of the directors of a company to take shares in the company, might, if his bill was filed before an order for winding up was made, sustain a suit for the recovery of his moneys, notwithstanding the company was being wound up. So also, it was held by the Lords Justices in Smith's Case, *Re* Reese River Co.,[4] that if a bill be filed to set aside a transaction on the ground of false representation, before a winding-up order has been made, a man is entitled to relief, notwithstanding a subsequent winding-up order. The application in this case was made under the winding up. In the former case, judgment was given on the bill.

If the parties to the transaction cannot be restored to their

[1] El. Bl. & El. 149.
[2] Western Bank of Scotland *v.* Addie, L. P 1, Sc. App. Ca. 167.
[3] L. R. 5; Eq. 262.
[4] L. R. 2; Ch. App. 604.

original condition, the transaction stands good, and cannot be rescinded. The party defrauded must seek redress in an action on the case at law for the fraud, or, if he is sued on the contract, he may recoup in damages.[1]

If the false representation by which a contract has been induced was not made fraudulently, but was made through mistake or misapprehension, and the subject-matter of the contract, though different in some respects and in certain incidents from what it was represented to be, is not so different in substance from what it was represented to be as to amount to a failure of consideration, the transaction will not be set aside, if the party who made the representation is willing to give compensation for the variance,[2] and the variance is such as to admit of compensation by a pecuniary equivalent.[3] If, however, the misdescription of the property is such that it cannot be estimated by a pecuniary equivalent, there is no case for compensation, and the transaction will be set aside.[4]

If the person by whose fraudulent misrepresentation a transaction has been induced, is not himself a party to the transaction, the transaction stands good and cannot be repudiated, if the other party to the transaction has not been party or privy to the fraud.[5]* The party defrauded must seek redress in an action in the case at law, for damages against the party of whose fraud he complains.[6] If, for instance, a man

[1] King *v.* Hamlet, 2 M. & K. 456; Great Luxemburg Railway Co. *v.* Magnay, 25 Beav. 587.

[2] See Dyer *v.* Hargrave, 10 Ves. 507; Hill *v.* Buckley, 17 Ves. 395; Martin *v.* Cotter, 3 J. & L. 496; Shackleton *v.* Sutcliffe, 1 Deg. & S. 620; Pulsford *v.* Richards, 17 Beav. 96.

[3] *Infra*, pp. 362–366.

[4] Leyland *v.* Illingworth, 2 D. F. & J. 248; Earl of Durham *v.* Legard, 34 Beav. 612. See Howland *v.* Norris, 1 Cox, 61.

[5] Pulsford *v.* Richards, 17 Beav. 95; Duranty's Case, 26 Beav. 270; Worth's Case, 4 Drew. 529; *Re* Felgate's Case, 2 D. J. & S. 456.

[6] Whitmore *v.* Mackeson, 16 Beav. 128; Pulsford *v.* Richards, 17 Beav. 95; Ellis *v.* Colman, 25 Beav. 673. See Pasley *v.* Freeman, 3 T. R. 52.

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* Appleton *v.* Horton, 25 Me. 23; Lee *v.* Vaughan, 1 Bibb, 235.

has been induced by the false representations of a third party to deal with another, he cannot have the transaction rescinded, if the other party to the transaction has not been party or privy to the false representation.[1] He must seek redress in an action on the case at law, against the party by whose false representations he has been induced to deal.[2] * So, also, if a man has been induced to take shares from a company by fraudulent misrepresentations made by some person, not by an agent of the company, authorized to make any representations or authorized to deal on behalf of the company, he is bound by his contract with the company, and cannot have it rescinded. He must seek redress in an action on the case at law against the person who made the representation.[3] So, also, if a man has been induced to buy shares in a company from a shareholder, on false and fraudulent representations made to him by the seller, the company not being a party or privy to the fraud, he is not entitled to have the transfer set aside as between himself and the company, or to restrain the company from making calls on him, whilst he is a shareholder. His remedy is against his vendor, to compel him to accept a re-transfer of the shares, and for an indemnity for the losses he has sustained in consequence of having taken the shares.[4]

Cases in which a man has been induced by false representations to purchase shares directly from a company, must be distinguished from cases in which the transaction is not with the company, but is between two individuals, meeting in the market and dealing for their private interests, like the seller and

[1] Pulsford *v.* Richards, 17 Beav. 95; Duranty's Case, 26 Beav. 271.

[2] *Ib.*

[3] Brockwell's Case, 4 Drew. 205; Nicoll's Case, 3 D. & J. 427.

[4] See Stainbank *v.* Fernley, 9 Sim. 556; Selden *v.* Connell, 10 Sim. 58, 79; Maturin *v.* Tredennick, 2 N. R. 514; 4 N. R. 15; Duranty's Case, 26 Beav. 271, 273; Worth's Case, 4 Drew. 529.

* Woodman *v.* Freeman, 25 Me. 531.

purchaser of transferable shares. If a man be induced by false representations on the part of the directors of a company, to purchase shares in the company from an actual shareholder, who has not been himself a party or privy to the false representations, the shares cannot be forced back on the vendor, because on his part the transaction has been *bonâ fide*, nor can the transaction be set aside as between the purchaser of the shares and the company; for the contract has been between individuals, and the company stands in point of law in the relation of a third party. The purchaser of the shares must seek his remedy at law against the parties by whose false representations he has been misled.[1]

All that equity can do where a man has been induced to enter into a transaction by the false and fraudulent representations of a person who is not a party to the transaction, is to make him make good his assertion as far as is possible.[2] And the court can do this in many cases. Where, accordingly, upon a treaty for marriage, a person, to whom the intended husband was indebted, was asked by the father of the lady to make out a list of the debts of the intended husband, and, in doing so, omitted the debt which was due to himself, on the representation made to him by the intended husband, that, if the debt were disclosed, the marriage would be prevented taking place, he was, after the marriage, restrained by perpetual injunction from enforcing the debt against the husband.[3] So, also, where upon a treaty of marriage, a brother, in order to make it appear that his sister had a fortune of £500, whereas she had only £350, gave her a sum of £150, so as to make up £500, and she

[1] Duranty's Case, 26 Beav. 273, 274; Inglis *v.* Lumsden, 21 Dec. of Ct. of Session, 2d series, 200. See Worth's Case, 4 Drew. 529.

[2] Pulsford *v.* Richards, 17 Beav. 87, 95. See Hobbs *v.* Norton, 1 Vern. 135; Arnot *v.* Biscoe, 1 Ves. 95; Burrowes *v.* Lock, 10 Ves. 470; Bushby *v.* Ellis; 17 Beav. 229; Stephens *v.* Venables, 31 Beav. 127; Yeomans *v.* Williams, L. R. 1 Eq. 185; Comp. Ellis *v.* Colman, 25 Beav. 673.

[3] Neville *v.* Wilkinson, 1 Bro. C. C. 543. See Dalbiac *v.* Dalbiac, 16 Ves. 124; Vauxhall Bridge Co. *v.* Lord Spencer, Jac. 67.

gave him a bond for the amount, and the marriage took place upon the faith of the representation, it was held that the bond could not be enforced, and it was ordered to be delivered up to be cancelled.[1] So, also, where a man had made a false representation as to the value of property, which he had agreed to charge as security for another person, his representatives were held bound to make it good.[2] So, also, where a marriage was contracted, and a settlement made on the faith of representations by the executor of a will, under which a certain sum of money was left to the intended husband, that the legacy was substantial and safe and would be paid at a future time, the estate of the executor was held to have thereby become indebted for the whole amount.[3] So, also, where a father previously to the marriage of his daughter, promises to the intended husband to leave her a sum of money, and the promise amounts to a distinct engagement or undertaking, and the marriage takes place on the faith of such representation, the court will give effect to it against the estate of the father.[4] So, also, the trustee of a fund, who, having received notice of an incumbrance on the fund, had represented to a creditor of the beneficiary that the fund was unincumbered, and that the beneficiary had a right to make an assignment, was held bound to make up the deficiency.[5] So, also, a solicitor who has made to his client untrue representations respecting a property on which his client is about to advance money, may be compelled to make good his representations.[6] *

[1] Gale *v.* Lindo, 1 Vern. 475. See Montefiori *v.* Montefiori, 1 W. Bl. 363. Ingram *v.* Thorpe, 7 Ha. 67.

[2] Hutton *v.* Rossiter, 7 D. M. & G. 9.

[3] Hammersley *v.* De Biel, 12 Cl. & Fin. 45; Barkworth *v.* Young, 4 Drew. 1; Maunsell *v.* Hedges, 4 H. L. 1039; Laver *v.* Fielder, 32 Beav. 1; Alt *v.* Alt, 4 Giff. 84. See Jameson *v.* Stein, 21 Beav. 5; Kay *v.* Crook, 3 Sm. & G. 407; Prole *v.* Soady, 2 Giff. 1; Stephens *v.* Venables, 31 Beav. 128.

[4] Burrowes *v.* Lock, 10 Ves. 470; Slim *v.* Croucher, 1 D. F. & J. 518.

[5] Cleland *v.* Leech, 5 Ir. Ch. 478.

* Bacon *v.* Johnson, 7 Johns. Ch. 194.

Though, where one person states a fact to be true, on the faith of which another acts, a court of equity will often compel him to make his assertion good, it does not follow that where a man has given a general character respecting another, the person to whom the representation was made can come into equity to compel him to make good his representation. Though a person who misrepresents the character or the credit of another, is liable for the damage occasioned by such representation, the amount can only be determined in a court of law by an action for damages.[1]

The rules with respect to sales by the court are not less stringent than in ordinary cases.[2] If a sale has taken place under a decree of the court, and there has been false representation or undue concealment in the conditions or particulars of sale, or a good title cannot be shown, the sale will be set aside if application be made before conveyance is executed.[3] If the conveyance be executed, the purchaser must take the consequences, and can only rely on the covenants.[4]

The court will not rescind a transaction without requiring the party in whose favor it interferes, to restore the party against whom relief is sought, as far as possible, to that which shall be a just situation, with reference to the rights which he held antecedently to the transaction.[5] * The terms on which a

[1] Whitmore *v.* Mackeson, 16 Beav. 128.
[2] Lachlan *v.* Reynolds, Kay, 55.
[3] *Ib.* McCulloch *v.* Gregory, 1 K. & J. 286. See Ward *v.* Trathe, 14 Sim. 82; Linehan *v.* Cotter, 7 Ir. Eq. 176.
[4] Thomas *v.* Powell, 2 Cox, 394; M'Culloch *v.* Gregory, 1 K. & J. 286.
[5] Bellamy *v.* Sabine, 2 Ph. 425; King *v.* Savery, 5 H. L. 627.

* The rules of law relating to specific performance and those applied to the rescission of contracts, although not identically the same, have a near affinity for each other. Boyce *v.* Grundy, 3 Pet. 210; Beck *v.* Simmons, 7 Ala. 71; Walker *v.* Collins, 11 Ohio, 31; Jackson *v.* Ashton, 11 Pet. 229.

Mere deterioration of the property is no objection to a rescission of the

transaction will be rescinded vary with the particular circumstances of the case. In some cases deeds have been absolutely rescinded[1] by the court decreeing them to be delivered up to be cancelled;[2] but the usual course of the court in setting aside a transaction, is to proceed on the maxim, that, he who seeks equity must do equity.[3] Instruments, accordingly, are either set aside on repayment of the actual consideration with interest thereon at a reasonable rate,[4]* or are directed to stand as a security for the moneys actually advanced, with interest thereon at a reasonable rate,[5] or for what upon investigation shall be ascertained to be really due.[6]† If the property is personal, a decree for the repayment of moneys, or the delivery up and cancellation of the instrument, will be complete relief,

[1] Bates *v.* Graves, 2 Ves. Jr. 287.

[2] See Jackman *v.* Mitchell, 13 Ves. 586.

[3] Wilkinson *v.* Fowkes, 9 Ha. 594.

[4] Barnadiston *v.* Lingood, 2 Atk. 133; Lawley *v.* Hooper, 3 Atk. 278; Gwynne *v.* Heaton, 1 Bro. C. C. 1; Lovell *v.* Hicks, 2 Y. & C. 55; Wilson *v.* Short, 6 Ha. 384; Ingram *v.* Thorp, 7 Ha. 67.

[5] Proof *v.* Hines, Forrest, 111; Crowe *v.* Ballard, 3 Bro. C. C. 120; Newman *v.* Payne, 2 Ves. Jr. 199; Byne *v.* Vivian, 5 Ves. 604; Davis *v.* Duke of Marlborough, 2 Sw. 166; Peacock *v.* Evans, 16 Ves. 512; Colclough *v.* Bolger, 4 Dow. 64; King *v.* Hamlet, 2 M. & K. 456; 3 Cl. & Fin. 218; Earl of Aldborough *v.* Trye, 7 Cl. & Fin. 436, 462; Carter *v.* Palmer, 8 Cl. & Fin. 657, 11 Bligh, 397; Billage *v.* Southee, 9 Ha. 540; Baker *v.* Bradley, 7 D. M. & G. 597; Croft *v.* Graham, 2 D. J. & S. 155.

[6] Wharton *v.* May, 5 Ves. 27; Purcell *v.* Macnamara, 14 Ves. 91; Watt *v.* Grove, 2 Sch. & Lef. 492; Longmate *v.* Ledger, 2 Giff. 157.

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contract. Veazie *v.* Williams, 8 How. 134; Buck *v.* McCaughtrey, 5 Mon. 216; Glover *v.* Smith, 1 Dessau. 433.

When a portion of the property has passed to the hands of a *bona fide* holder, the court may enter a decree against the defendant for its value, and compel a surrender of the balance. McNeil *v.* Turner, 6 Munf. 316.

A decree for a rescission of the contract without a restoration of the property, is erroneous. Camplin *v.* Burton, 2 J. J. Marsh. 216; Waters *v.* Lemmon, 4 Ohio, 229.

A vendee who has bought in an adverse claim cannot obtain a rescission of the contract without surrendering the property. Grundy *v.* Jackson, 1 Litt. 11.

* Gardner *v.* Ogden, 22 N. Y. 327; Wellford *v.* Chancellor, 5 Gratt. 39; Miles *v.* Irvin, 1 McCord's Ch. 524.

† Smith *v.* Lansing, 22 N. Y. 520; Owing's Case, 1 Bland, 370; Currie *v.* Coules, 6 Bosw. 452.

although the legal interest should have been conveyed.[1] But if the subject-matter of the transaction be real estate, it is usual to direct a reconveyance, because if this is not done, a question may arise as to what has become of the real estate.[2] If, however, the deed is not merely voidable, but wholly void, no reconveyance is necessary.[3]

The terms on which a reconveyance will be ordered, are the repayment of the purchase-moneys and all sums laid out in improvements and repairs of a permanent and substantial nature, by which the present value is improved, with interest thereon from the times when they were actually disbursed.* On the other hand, charges for the deterioration of

[1] See 1 Ves. 376; Williamson *v.* Gihon, 2 Sch. & Lef. 357; Eastabrook *v.* Scott, 3 Ves. 455; Cooper *v.* Joel, 1 B. F. & J. 240; Slim *v.* Croucher, *ib.* 520.

[2] Pickett *v.* Loggon, 14 Ves. 231; Clark *v.* Malpas, 31 L. J. Ch. 696; but see Hoghton *v.* Hoghton, 15 Beav. 278; Att. Gen. *v.* Magdalen College, 18 Beav. 255

[3] Ogilvie *v.* Jeaffreson, 2 Giff. 381.

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* Harding *v.* Handy, 11 Wheat. 103; Brooke *v.* Berry, 2 Gill, 83; Moseley *v.* Buck, 3 Munf. 232; Tyler *v.* Black, 13 How. 230; Glass *v.* Brown, 6 Mon. 356; Ellis *v.* Graves, 5 Dana, 119; Bullock *v.* Beemis, 1 A. K. Marsh. 433; Caldwell *v.* White, 5 J. J. Marsh. 207.

If the vendee buys up a better title than that of the vendor, and the vendor is not guilty of fraud, he can only be compelled to refund to the vendee the amount paid for the better title and a reasonable compensation for trouble and expenses. Galloway *v.* Finley, 12 Pet. 264.

The purchaser will not be compelled to account for rent when he is liable to others for it. Glass *v.* Brown, 6 Mon. 356.

The use of the property by the vendee is generally held to balance the interest on the purchase money. Talbot *v.* Subree, 1 Dana, 56; Williams *v.* Rogers, 2 Dana, 374; Williams *v.* Wilson, 4 Dana, 507.

The rule does not apply to unproductive lands. Shields *v.* Bogliolo, 7 Mo. 134.

A grantee, in case of constructive fraud, is not responsible for profits. When, however, there is actual fraud, the grantee may be charged with profits. Backhouse *v.* Jetts, 1 Brock, 500.

There is no instance of any reimbursement or indemnity afforded by a court of equity to a *particeps criminis* in a case of positive fraud upon creditors. Sands *v.* Codwise, 4 Johns. 336; Borland *v.* Walker, 7 Ala. 269; White *v.* Graves, 7 J. J. Marsh. 523; Weedon *v.* Hawes, 10 Ct. 50.

the property must be set off against the allowances for permanent improvements. The party in possession must also account for all rents received by him and for all profits, such as moneys arising from the sale of timber, or from working mines, with interest thereon, from the times of the receipt thereof. He must also pay an occupation rent for such part of the estate as may have been in his actual possession.[1] Allowance for lasting improvements can only be for such as were made during the period of accounting for the rents.[2] The account of rents and profits on the one side, and of lasting improvements on the other, must be carried back to the same time.[3] The decree is erroneous if it directs the account of rents and profits to begin at one time, and the account of lasting improvements at another, unless there is some special reason for doing so.[4] The party in possession would also, it is conceived, be required to reinstate premises which he had materially altered; *e. g.* a private residence into a shop.[5]

[1] Savage *v.* Taylor, Forrest. 234; Att.-Gen. *v.* Balliol College, 9 Mod. 412; York Buildings Co. *v.* M'Kenzie, 3 Pat. Sc. App. Ca. 398, 579, 3 Ross's L. C. Sc. 305; Ward *v.* Hartpole, cit. 3 Bligh, 470; *Ex-parte* Hughes, 6 Ves. 617; *Ex-parte* Bennett, 10 Ves. 381; Murray *v.* Palmer, 2 Sch. & Lef. 490; Edwards *v.* M'Cleay, Coop. 308, 2 Sw. 287; Donovan *v* Fricker, Jac. 165; Trevelyan *v.* Charter, 4 L. J. Ch. N. S. 214; Trevelyan *v.* White 1 Beav. 588; Mulhallen *v.* Marum, 3 Dr. & War. 337; Gibson *v.* D'Este, 2 Y. & C. C. C. 581; Mill *v.* Hill, 3 H. L. 828; Davey *v.* Durrant, 1 D. & J. 554; Tyrrell *v.* Bank of London, 10 H. L. 26; Stepney *v.* Biddulph, 13 W. R. 576; 5 N. R. 506; Dally *v.* Wonham, 33 Beav. 162. See Douglas *v.* Culverwell, 31 L. J. Ch. 543; Cooper *v.* Phibbs, L. R. 2 App. Ca. 171.

[2] Att.-Gen. *v.* Earl of Craven, 21 Beav. 411.

[3] Neesom *v.* Clarkson, 4 Ha. 103.

[4] *Ib.* See as to allowance for improvements of charity property, Att.-Gen. *v.* Kerr, 2 Beav. 429; Att.-Gen. *v.* Magdalen College, 18 Beav. 254; Att.-Gen. *v.* Davey, 19 Beav. 527.

[5] Donovan *v.* Fricker, Jac. 165.

Reimbursement may be allowed when there is only constructive and no actual fraud. Gardiner Bank *v.* Wheaton, 8 Greenl. 373; Parker *v.* Holmes, 2 Hill's Ch. 95; Cummings *v.* McCullough, 5 Ala. 324.

If a party has allowed his name to be used in a fraudulent assignment, and suffered the property to be squandered, he will be compelled to account for its value to the creditors. Hughes *v.* Bloomer, 9 Paige, 269.

The value of permanent and substantial improvements of all kinds, by which the present value of the property is improved, such as for the erection of a mansion house, and for plantations of shrubs, will be allowed.[1] * But no allowance will be made for moneys which have been expended by the party in possession, as a matter of taste or personal enjoyment.[2] Nor will allowance be made for moneys which have been expended upon the property with the view of rendering it impossible for the real owner to recover his estate, and so improving him out of it, as it may be called.[3]

A purchaser who seeks to set aside a transaction on the ground of fraud, should specially pray in his bill for the repayment of repairs and improvements. He will be credited with the amount of repairs and improvements, executed before the discovery of the defect in title, if their repayment is specially prayed by the bill;[4] and, probably, of necessary repairs executed during or pending litigation, if specially prayed.[5]

In a case where a purchase was set aside for fraud, and the purchaser was decreed to pay an occupation rent, receiving back his purchase moneys with interest, there being a considerable excess of the rent over the interest, annual rests were directed, until the principal should be liquidated;[6] but a special case must be shown to warrant such a direction.[7]

[1] York Buildings Co. *v.* M'Kenzie, 3 Pat. Sc. App. 398, 579; 3 Ross. L. C. Sc. 305; Stepney *v.* Biddulph, 13 W. R. 576, 5 N. R. 506.

[2] York Buildings Co. *v.* M'Kenzie, 3 Pat. Sc. Ap. 398, 579, 3 Ross. L. C. Sc. 305; Att.-Gen. *v.* Kerr, 2 Beav. 429; Mill *v.* Hill, 3 H. L. 828.

[3] Kenney *v.* Brown, 3 Ridg. 518; Stepney *v.* Biddulph, 5 N. R. 505, 13 W. R. 576, Sug. V. & P. 287. See Pelly *v.* Bascombe, 4 Giff. 390.

[4] See Edwards *v.* M'Cleay, 2 Sw. 289.

[5] Sug. V. & P. 279; Dart. V. & P. 523.

[6] Donovan *v.* Fricker, Jac. 165.

[7] See Neesom *v.* Clarkson, 4 Ha. 97.

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* Michoud *v.* Girod, 4 How. 503; Leary *v.* Cox, 2 Dana, 469.

Losses incurred in making improvements and constructing works in a saltpetre cave which has been misrepresented, can not be allowed. Peyton *v.* Butler, 3 Hey, 141.

It is not the course of the court to direct an account of wilful neglect and default, in cases where the possession is not primarily referable to the character of mortgagee.[1] When persons, though in fact mortgagees, enter into possession of rents and profits in another character, they cannot be subjected to that special liability.[2] The rule may be different if a special case of fraud be made out.[3]

If there has been long delay in filing the bill, the accounts of rents and profits will be limited to the time of filing the bill.[4] *

If the transaction complained of is one in which a trustee or agent, employed to purchase, has sold property of his own surreptitiously, to his *cestui que trust* or principal, the right of the latter is not merely to rescind the contract *in toto*, or to abide by it in its integrity, but to hold the property, and to pay no more for it than the trustee or agent himself had paid.[5] If the agent sells to his principal property of his own for which he has paid nothing, the principal can only retain the property upon the terms of paying its proper value.[6]

If the trustee, or other person, filling a fiduciary character, has purchased surreptitiously from the person towards whom he stands in such relation, and the latter does not wish for a

[1] Murray *v.* Palmer, 2 Sch. & Lef. 486; Trevelyan *v.* Charter, 4 L. J. Ch. N. S. 214; Murphy *v.* O'Shea, 2 J. & L. 422; Sherwin *v.* Shakespeare, 5 D. M. & G. 531; Lord Kensington *v.* Bouverie, 7 D. M. & G. 134, 156, 157; Parkinson *v.* Hanbury, 2 D. J. & S. 450. See decree in Gresley *v.* Mousley, 4 D. & J. 101; but see decree in Murray *v.* Palmer, 2 Sch. & Lef. 489; Gibson *v.* D'Este, 2 Y. & C. C. C. 581.

[2] Parkinson *v.* Hanbury, L. R. 2 App. Ca. 1.

[3] Howell *v.* Howell, 2 M. & C. 478; Adams *v.* Sworder, 2 D. J. & S. 44; Parkinson *v.* Hanbury, L. R. 2 App. Ca. 15.

[4] Pickett *v.* Loggon, 14 Ves. 231; Mulhallen *v.* Marum, 3 Dr. & War. 317.

[5] Bank of London *v.* Tyrrell, 10 H. L. 26.

[6] Great Luxemburg Railway Co. *v.* Magnay, 25 Beav. 595.

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* When an account consists of numerous items, rests are proper substitutes for a computation of interest on each item. Harding *v.* Handy, 11 Wheat. 103.

reconveyance of the property, the former will be held strictly to his bargain, if it be beneficial to the estate. If it be not beneficial to the estate, the property will be ordered to be re-sold and reconveyed to another purchaser, if a better can be found; otherwise, he will be held to his purchase; if a better purchaser be found, he will be regarded as a trustee for the profit on the resale,[1] and will be held responsible for any loss which his interference with the sale may have occasioned.[2] In a case where an estate sold under a decree of the court was purchased by a solicitor in the cause without leave of the court, the court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which he had purchased it; and, if there should be no higher price, that he should be held to his purchase.[3] In Williamson *v.* Seaber,[4] where permanent improvements had been made, the estate was put up at its improved value, subject to the question whether he should be allowed the value of such improvements. But the usual course is to order that the expense of repairs and improvements, not only substantial and lasting, but such as have a tendency to bring the estate to a better sale, after making an allowance for acts that deteriorate the value of the estate, shall be added to the purchase-moneys, and that the estate shall be put up at the accumulated sum.[5] If the trustee, or other person filling a fiduciary character, who has purchased property surreptitiously from the person towards whom he stands in such relation, has resold the property at a profit, he must account for such profit with interest.[6]

[1] *Ex-parte* Reynolds, 5 Ves. 707; *Ex-parte* Hughes, 6 Ves. 617; Randall *v.* Errington, 10 Ves. 423; *Ex-parte* Morgan, 12 Ves. 6; *Ex-parte* Lewis, 1 Gl. & Ja. 69.

[2] *Ex-parte* Lewis, *ib.*

[3] Sidney *v.* Ranger, 12 Sim. 118. See Nelthorpe *v.* Pennyman, 14 Ves. 517.

[4] 3 Y. & C. 717.

[5] *Ex-parte* Reynolds, 5 Ves. 707; *Ex-parte* Lacey, 6 Ves. 625, 629; *Ex-parte* Bennett, 10 Ves. 381.

[6] Fox *v.* Macreth, 2 Bro. C. C. 400; Hall *v.* Hallett, 1 Cox, 134; *Ex-parte* Reynolds, 5 Ves. 707; Brookman *v.* Rothschild, 3 Sim. 153; Rothschild *v.* Brookman, 2 Dow & Cl. 188. See Bank of London *v.* Tyrrell, 10 H. L. 26.

In a case where a servant took an agreement for a lease of premises in his own name, but really as the agent of his master, and having afterwards denied the agency, claimed to hold the premises for his own benefit, he was decreed by the court to be a trustee for his master.[1]

Where a transaction is set aside on the ground of fraud the party complaining will be allowed all costs, charges, and expenses properly incurred in respect of and incident to the transaction, including the costs of conveyance.[2]

In taking the accounts between the parties, interest at the rate of £4 per cent. per annum, will be allowed on all moneys expended in lasting and substantial improvements by the party in possession. The same rate of interest will, as a general rule, be debited to him in respect of moneys, &c., &c., received by him, and of costs, charges, and expenses properly incurred by the complaining party.[3] If, however, there has been a breach of duty, and violation of trust, he will be debited with interest on moneys received, or profits made by him, at the rate of £5 per cent.[4] If there has been negligence on the part of the complaining party, interest will not be allowed.[5]

In ordinary cases, when the court sets aside a transaction, the defendant has a right to insist upon an account before he is called upon to reconvey;[6]* but a defendant who is in pos-

[1] Earl of Stamford *v.* Dawson, 15 W. R. 896.

[2] Edwards *v.* M'Cleay, 2 Sw. 289; Berry *v.* Armitstead, 2 Keen, 221; Mulhallen *v.* Marum, 3 Dr. & War. 317; Gibson *v.* D'Este, 2 Y. & C. C. C. 581; Slim *v.* Croucher, 1 D. F. & J. 520; Cartledge *v.* Radbourn, 14 W. R. 604.

[3] Gibson *v.* D'Este, 2 Y. & C. C. C. 581; Sharp *v.* Leach, 31 Beav. 503; Maturin *v.* Tredennick, 12 W. R. 740. See Lovell *v.* Hicks, 2 Y. & C. 55; £5 per cent. was formerly allowed, see Jac 166, 179; see also Edwards *v.* Browne, 2 Coll. 1 7; Att.-Gen. *v.* Alford, 4 D. M & G. 843; Mayor, &c., of Berwick *v.* Murray, 7 D. M. & G. 513; and is sometimes even now allowed; Stepney *v.* Biddulph, 13 W. R. 576.

[4] Benson *v.* Heathorn, 1 Y. & C. C. C. 340; Mayor, &c., of Berwick *v.* Murray, 7 D. M. & G. 518; Bank of London *v.* Tyrrell, 10 H. L. 63. See St. Aubyn *v.* Smart, L. R. 5 Eq. 183.

[5] M'Culloch *v.* Gregory, 1 K. & J. 286.

[6] Murray *v.* Palmer, 2 Sch. & Lef. 490; Gibson *v.* D'Este, 2 Y. & C. C. C. 581; Wilkinson *v.* Fowkes, 9 Ha 594.

* Miller *v.* Colton, 5 Geo. 341; Bibb *v.* Prather, 1 Bibb, 313.

session under a pretended purchase cannot, if the court shall be of opinion that there has been in fact no purchase, insist upon an account of moneys paid by, or owing to him, which he alleged, but failed to prove, was the consideration agreed upon for such purchase.[1] If a reconveyance is ordered, and an account of rents and payment of the balance is ordered, but no lien for such balance is given on the estate, the conveyance must be made at once, without waiting for the result of the accounts.[2]

In one case the purchaser, obtaining a decree for rescinding a contract, on the ground of fraud, was allowed to follow the stock in which part of the purchase-money had been invested.[3]

If the transaction into which a man had been induced by fraud to enter is a partnership, the terms of rescission will be that his partner or copartners repay him whatever he may have paid, with interest thereon, and indemnify him against all claims and demands which he may have become subject to by reason of his having entered into the partnership; he, on the other hand, accounting for what he may have received since his entry into the concern.[4]

If a man has been induced by false representations in the prospectus of a company to take shares from the company, he is entitled to recover his money, and to have his name removed from the register.[5] If he has received dividends before discovering the fraud, the terms of rescission are, that his name shall be removed from the register, and that an account shall be taken of what sums have been paid to him by the company, and of what sums he has received with interest at a reasonable rate, and that the balance shall be paid to him with all costs.[6]

[1] Wilkinson *v.* Fowkes, *ib.*
[2] Trevelyan *v.* Charter, 9 Beav. 140.
[3] Small *v.* Attwood, Younge, 507.
[4] Lindl. on Part. p. 929.
[5] Blake's Case, 34 Beav. 639; Ross *v.* Estates Investment Co., L. R. 3 Eq. 122; Fox's Case, 37 L. J. Ch. 257; Chester *v.* Spargo, 16 W. R. 576.
[6] Kent *v.* Freehold Land and Brickmaking Co., L. R. 4 Eq. 598.

Where a person, in order to defraud his creditors, has transferred stock to a fictitious person, upon proof of the fact, it will be ordered that the fictitious name shall be erased from the register, and that the name of the real owner be inserted.[1]

If a case for rescission be not made out, the bill may be dismissed, without prejudice to any action at law that the plaintiff may bring.[2]

If an instrument be founded on fraud, there can be no rectification. The court can reform an instrument only where its incorrectness arises from mistake, from ignorance, or accident, and does not go to impeach the general fairness of the transaction.[3]

If a man's name has been placed on the register of shareholders of a company, without his consent, through the false representations of a third party, and an order to wind up the company has been subsequently made, the court will order it to be removed from the register.[4]

In cases where a man has fraudulently appropriated to his own use moneys belonging to another, the appropriate remedy of the Court of Chancery is by declaring him a trustee of such moneys, and ordering him to make them good.[5]

A court of equity will relieve against fraud in judicial proceedings. If a party has been induced by fraud to consent to a decree, or if fraud in obtaining a decree has been practiced on the court, the court will grant relief on being satisfied that the conduct of the party himself has not deprived him of his title to relief, and that the relief can be given with due regard to the just interests of others.[6]

[1] Green *v.* Bank of England, 3 Y. & C. 722; Arthur *v.* Midland Railway Co., 3 K. & J. 204.

[2] Bartlett *v.* Salmon, 6 D. M. & G. 33. See Evans *v.* Bicknell, 6 Ves. 191.

[3] Watt *v.* Grove, 2 Sch. & Lef. 502. See Hartopp *v.* Hartopp, 21 Beav. 259.

[4] *Re* Patent File Co., *Ex-parte* White, 15 W. R. 754.

[5] Rolfe *v.* Gregory, 34 L. J. Ch. 274; Charlton *v.* Coombs, 4 Giff. 385.

[6] Barnesly *v.* Powell, 1 Ves. 120, 285; Davenport *v.* Stafford, 8 Beav. 522, *supra*, p. 43.

Where any fraud or collusion has been practiced, a sale and conveyance cannot be held valid, although they have the colorable protection of a decree of a court of equity.[1] * The orders of the court cannot, however, be set aside on grounds less strong than those which would be required to set aside transactions between competent parties.[2] To set aside, on the ground of fraud, a decree signed and enrolled, actual positive fraud must be shown. There must be on the part of the person chargeable with it, the *malus animus*, the *mala mens* putting itself in motion, and acting in order to take an undue advantage for the purpose of actually and knowingly committing a fraud. The fraud must be a fraud which can be explained and defined upon the face of the decree. Mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorize the court to set aside a decree.[3]

Though the court cannot set aside the judgment of a common law court obtained against conscience, it will consider the person who has obtained the judgment as a trustee, and will decree him to reconvey any property that he may have become possessed of under the judgment, on the ground of laying hold of his conscience, so as to make him do that which is necessary to restore matters as before.[4] With respect to fines which had been obtained by fraud, the court would not absolutely set aside a fine so obtained, nor would

[1] Colclough *v.* Bolger, 4 Dow. 64.
[2] Brooke *v.* Lord Mostyn, 2 D. J. & S. 416.
[3] Patch *v.* Ward, L. R. 3 Ch. App. 203.
[4] Barnesly *v.* Powell, 1 Ves. 120, 285.

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* Galatian *v.* Erwin, 1 Hopk. 48.

A purchaser who has obtained a decree rescinding the deed, and directing a reconveyance and repayment of the purchase-money, can not secretly record a deed of conveyance and sell the property under an execution, without delivering possession. Buckner *v.* Forker, 7 Dana, 50.

it send the party aggrieved to the court of Common Pleas to get it vacated. The course of the court was, to consider all persons taking an estate under the fine, with notice of the fraud, as trustees for the party defrauded, and to decree a reconveyance of the land, on the general ground of laying hold of the conscience of the parties to make them do that which was necessary for restoring matters to their former position.[1]

Though a court of equity has no jurisdiction to relieve against fraud in obtaining the setting up or execution of a will,[2] it may relieve against a probate obtained by fraud by converting the party taking under the instrument into a trustee for the party defrauded.[3]

"The cases," said Lord Lyndhurst, in Allen *v.* Macpherson,[4] "in which this court has declared a legatee or executor to be a trustee for other persons, have been cases in which there have been either questions of construction,[5] or cases in which the party has been named as trustee, or has engaged to take as such,[6] or in which the Court of Probate could afford no adequate or proper remedy."[7] A legacy given to a person in a character which the legatee does not fill, and by the fraudulent assumption of which character the testator has been deceived, will not take effect. A false character, however, attributed by a testator to a legatee, will not affect the validity of the legacy, unless the false character has been acquired by a fraud which deceived the testator.[8]

A charter which has been obtained from the crown by

[1] Cruise Dig. tit. XXXV, c. xiv, § 12. See Pickett *v.* Loggon, 14 Ves. 234; Hampson *v.* Hampson, 3 V. & B. 42; Langley *v.* Fisher, 9 Beav. 100; Tarleton *v.* Liddell, 17 Q. B. 414.

[2] Allen *v.* Macpherson, 1 H. L. 191; *supra*, p. 44.

[3] Barnesley *v.* Powell, 1 Ves. 287; Allen *v.* Macpherson, 1 Ph. 145; 1 H. L. 213.

[4] 1 H. L. 214.

[5] Kennell *v.* Abbott, 4 Ves. 802.

[6] Thynn *v.* Thynn, 1 Vern. 296; Kennell *v.* Abbott, 4 Ves. 802; Podmore *v.* Gunning, 7 Sim. 660; *supra*, p. 274, 275.

[7] See Segrave *v.* Kirwan, Beat. 157; Charlton *v.* Coombs, 4 Giff. 385; Wilkinson *v* Jonghin, L. R. 2 Eq. 319.

[8] Giles *v.* Giles, 1 Keen, 692.

fraud, may be repealed by *sci. fa.*; but so long as it remains unrepealed, its validity cannot be disputed.[1]

The appropriate remedy of the Court of Chancery against fraud may, under the peculiar circumstance of the case, be by way of injunction. An injunction may be had either to restrain proceedings at law upon an instrument which is vitiated by fraud, or to restrain a man from doing acts which amount to a fraud, in the extensive signification in which that term is understood by a court of equity. Although a man may have a good defence at law to an action on an instrument which is vitiated by fraud, he is not precluded from proceeding in equity to restrain the action.[2] If there be an equitable case stated by the bill, there is jurisdiction to interfere by way of injunction, if necessary, and also by way of ordering the instrument to be delivered up.[3] *

In restraining by injunction acts which are fraudulent in the sense of a court of equity, the court exercises a most extensive jurisdiction. Injunctions may be had upon a proper case being made out, to restrain a man from parting with or transferring property, or paying or receiving moneys, &c., &c.,[4] from negotiating securities,[5] from selling property,[6] &c., &c.

[1] See Macbride *v.* Lindsay, 9 Ha. 574. See as to setting aside letters patent obtained by fraud, Att.-Gen. *v.* Vernon, 1 Vern. 369.

[2] Fernyhough *v.* Leader, 15 L. J. Ch. 458; London Assurance Co. *v.* Moses, 11 L. T. 532.

[3] Traill *v.* Baring, 33 L. J. Ch. 527, *per* Turner, L. J. *supra*, p. 47; Kerr on Inj. 33.

[4] Kerr on Inj. 595.

[5] *Ib.*

[6] *Ib.* 592.

* Possession alone is a protection against a title obtained by fraud. Niles *v.* Anderson, 5 How. (Miss.) 365.

A party seeking to enjoin a judgment upon a fraudulent contract, must assign reasons why the defence was not made at law. Allen *v.* Hopson, 1 Freem. 276.

A party may be enjoined from claiming more under a deed than would pass according to his representations. Harding *v.* Randall, 15 Me. 332.

If on account of a contract between A and B. A gave his note to C. who is a creditor of B. A can not be relieved from his note because of a fraud committed by B in his contract with A. Williamson *v.* Ranney, 1 Freem. Ch. 112.

So, also, injunctions may be had to restrain the piracy of trade marks.[1] So, also, if a man has by his conduct encouraged another to expend moneys on property, or deal in a matter of interest, a court of equity will restrain him from derogating from the interest in which that other has been induced to deal, or from enforcing his legal right against him, unless the latter has received the benefit which he contemplated at the time he was induced to alter his condition.[2] Where, accordingly, a lessor, pending an agreement for a building lease, represented to the intended lessee that he could not obstruct the sea view from the houses to be built by the lessee, pursuant to the proposed lease, because he himself was a lessee under a lease for 999 years, containing covenants which restricted him from so doing; but after the building lease had been taken, and the houses built upon the faith of the representation, the lessor surrendered his 999 years' lease, and took a new lease, omitting the restrictive covenants, the court restrained him, by injunction, from building so as to obstruct the sea view.[3] So, also, where on one of two partners retiring from business, it was left to arbitration to determine what was to be paid to the retiring partner for the good-will of the business; and the arbitrators, on the clear understanding of the parties that the retiring partner would not set up trade in the vicinity, allowed him £500 as his share of the good-will, but the award was silent on the subject; the court, nevertheless, upon parol evidence of the understanding on which the award was made, restrained him from carrying on trade in the same vicinity.[4] So, also, a man who has permitted the owner of the adjoining premises to rebuild them to a greater height than they were before, and to alter his ancient lights, and to open new ones,

[1] Kerr on Inj. 474–489.
[2] *Supra*, p. 126.
[3] Piggott *v.* Stratton, John. 359, 1 D. F. & J. 33.
[4] Harrison *v.* Gardiner, 2 Madd. 198.

will be restrained by injunction from interrupting the lights after they are completed.[1]

Where the aid of a court of equity is sought by way of specific performance of a contract, the principles of ethics have a more extensive sway than when a contract is sought to be rescinded. The court is not bound to decree specific performance in every case where it will not set aside a contract, or to set aside every contract that it will not specifically perform.[2] When the rescision of a contract is sought, a case must be made out showing that the transaction is not only unfit to be acted on in equity, but is also unfit to be acted on at law;[3] but it does not follow, though a contract be good in point of law, that it must be carried into execution in equity. Many circumstances may operate to induce a court of equity to refuse its assistance, though the agreement may stand the test of a court of law.[4]* The court in such cases simply refuses to interfere, leaving the parties to such consequences as may follow from the legal rights which the contract may have given them.[5]† Specific performance rests with the discretion of the court upon a view of all the circumstances[6]‡

[1] Cotching *v.* Bassett, 32 Beav. 101. See further, *supra*, 127–133; Kerr on Inj. 201–205, 349.

[2] Cadman *v.* Horner, 18 Ves. 10; Vigers *v.* Pike, 8 Cl. & Fin. 645; Wilde *v.* Gibson, 1 H. L. 607; Rawlins *v.* Wickham, 3 D. & J. 322.

[3] Vigers *v.* Pike, 8 Cl. & Fin. 645. See Willan *v.* Willan, 2 Dow. 275.

[4] Martin *v.* Mitchell, 2 J. & W. 420; Bartlett *v.* Salmon, 6 D. M. & G. 33; Higgins *v.* Samels, 2 J. & H. 460.

[5] Bellamy *v.* Sabine, 2 Ph. 449; Myers *v.* Watson, 1 Sim. N. S. 529.

[6] White *v.* Damon, 7 Ves. 33; Radcliffe *v.* Warrington, 12 Ves. 331; Falcke *v.* Gray, 4 Drew. 659; Watson *v.* Marston, 4 D. M. & G. 230.

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* Henderson *v.* Hays, 2 Watts. 148; McWhorter *v.* McMahon, 1 Clarke, 400; Frisby *v.* Ballance, 4 Scam. 289; Gould *v.* Womack, 2 Ala. 83.

† King *v.* Hamilton, 4 Pet. 311; Eastland *v.* Vanarsdale, 3 Bibb, 274; Rice *v.* Rawlings, Meigs, 496; Hall *v.* Ross, 3 Hey, 200.

‡ Pratt *v.* Carroll, 8 Cranch, 471; Reinicker *v.* Smith, 2 H. & J. 421; Perkins *v.* Wright, 3 H. & McH. 324; Leigh *v.* Crump, 1 Ired. Eq. 299; Clitherall *v.* Ogilvie, 1 Dessau. 256.

A court of equity will not set up a deed which has been suppressed as

and with an eye to the substantial justice of the case.[1]* Where a party calls for specific performance, he must, as to every part of the transaction, be free from every imputation of fraud or deceit. An agreement affected by misrepresentation, or tainted by deceit, is incapable of being made the subject of the interference of a court of equity in order to compel its specific performance.[2]† There can be no specific performance if a material and important fact be untruly stated.[3] It is no answer, in a suit for specific performance, to the fact of the plaintiff having made a false representation, to say that the defendant was imprudent. A man who calls for specific performance must be able to show that his conduct has been clear, honorable, and fair.[4] It is a principle in equity that the court must see its way very clearly before it will decree specific performance, and that it must be satisfied as to the integrity and good faith of the party seeking its interference.[5] Misrepresentation as to a small portion only of the property, the subject of the contract, will, if the misrepresentation is intentional, prevent a man from coming to the court to have

[1] King *v.* Hamilton, 4 Peters (Amer.), 311.

[2] Harris *v.* Kemble, 7 L. J. Ch. 83; 5 Bligh, 730. See Philipps *v.* Duke of Bucks, 1 Vern. 227; Ellard *v.* Lord Llandaff, 1 Ba. & Be. 241; Brealey *v.* Collins, You. 317; Walters *v.* Morgan, 3 D. F. & J. 718; Colby *v.* Gadsden, 15 W. R. 1185.

[3] Price *v.* Macaulay, 2 D. M. & G. 339.

[4] Cox *v.* Middleton, 2 Drew. 220; Walters *v.* Morgan, 3 D. F. & J. 718.

[5] Brealey *v.* Collins, You. 327; Walters *v.* Morgan, 3 D. F. & J. 718.

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a justifiable guard against fraud and injustice meditated against the grantor. Chapman *v.* Chapman, 4 Call, 436.

When a vendor has fraudulently led a vendee to suppose that more land would pass under a deed than did pass, he may be compelled to give a deed for the residue. Wiserall *v.* Hall, 3 Paige, 313; Tyson *v.* Passmore, 2 Barr, 122.

* Western R. R. Co. *v.* Babcock, 6 Met. 346; Quick *v.* Stuyvesant, 2 Paige, 84; Hopkins *v.* Stump, 2 H. & J. 301; Ellis *v.* Burden, 1 Ala. 458.

† Thompson *v.* Tod, Pet. C. C. 380; Slack *v.* McLagan, 15 Ill. 242; Clement *v.* Reid, 9 Smed. & Mar. 535; Fuller *v.* Perkins, 7 Ohio, 196; Carberry *v.* Tannehill, 1 H. & J. 224.

the contract enforced. It is not sufficient that the vendor offer to waive the portion affected by the representation.[1] The effect of a partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the party making the application.[2] Misrepresentation of a material fact, although innocently made, will be a bar to the application.[3] If a prospectus be issued containing material representations, and a person accepts shares on the faith of the representations, the party who made the representations cannot, if they prove to be untrue, compel the other party to accept the shares, although he believed what he stated to be true.[4] It is a defence to a bill for specific performance that the plaintiff has made inaccurate representations with respect to the property, the subject of the contract, although these representations proceeded upon and had reference to sources of information which were equally open to all parties, and might have enabled the defendant to detect the alleged inaccuracies, if the evidence shows that they could not have been easily detected.[5] There may, however, be specific performance, although the description of the property, the subject of the contract, be incorrect, if it appear that the purchaser knew at the time of the purchase that the representation was untrue, or inspected the property before making the purchase, and so acted upon his own judgment in the matter;[6]

[1] Viscount Clermont *v.* Tasburgh, 1 J. & W. 119, 120.

[2] *Ib.* Stewart *v.* Alliston, 1 Mer. 26. See Rawlins *v.* Wickham, 3 D. & J. 321.

[3] Ainslee *v.* Medlycott, 9 Ves. 13, 21; Higginson *v.* Clowes, 15 Ves. 524; Stewart *v.* Alliston, 1 Mer. 26; Price *v.* Macaulay, 2 D. M. & G. 339; Higgins *v.* Samels, 2 J. & H. 460; Comp. White *v.* Bradshaw, 16 Jur. 738; Hume *v.* Pocock, L. R. 1 Ch. App. 379.

[4] New Brunswick, &c., Railway Co. *v.* Muggeridge, 1 Dr. & Sm. 363, 382.

[5] Harris *v.* Kemble, 7 L. J. Ch. 85; 5 Bligh, 730. See Rawlins *v.* Wickham, 3 D. & J. 318; Higgins *v.* Samels, 2 J. & H. 468; Colby *v.* Gadsden, 15 W. R. 1185.

[6] Dyer *v.* Hargrave, 10 Ves. 505; Grant *v.* Munt, Coop. 177; Lord Brooke *v.* Roundthwaite, 5 Ha. 306; Haywood *v.* Cope, 25 Beav. 140; Clarke *v.* Mackintosh, 4 Giff. 134; Henderson *v.* Hudson, 15 W. R. 860; Comp. Higgins *v.* Samels, 2 J. & H. 468; Vivers *v.* Tuck, 1 Moo. P. C. N. S. 526.

or if there were circumstances in the case which demanded further investigation, for which the vendor afforded every facility;[1] or if the representations which have been made are vague in their terms, and merely amount to a statement of value or opinion.[2]

There cannot be specific performance if the description of the property is of so ambiguous a nature that it cannot with certainty be known what it was the purchaser imagined himself he was contracting for.[3] A vendor of property who makes statements respecting the property, is bound to make them free from all ambiguity; and the purchaser is not bound to take upon himself the peril of ascertaining the true meaning of the statements.[4] A definite representation upon a fact affecting the value of the subject of sale will entitle the purchaser, if the representation be untrue, to resist specific performance.[5] It is the duty of every vendor to state all the circumstances connected with the property he is selling, and the incidents to which it is subject, in such a manner that they can be understood by a person of ordinary intelligence, and not merely in such a way that only a skilled lawyer would be able to ascertain the nature of the title under which he is purchasing.[6] If leasehold property, which is sold in separate lots, is held under one lease, it is incumbent on the vendor to state the fact in plain and distinct language.[7]

If there be unusual covenants in a lease, and the seller is silent as to their existence, he will not be able to enforce specific performance against a purchaser buying in ignorance of the covenants.[8]

[1] Clarke *v.* Mackintosh, 4 Giff. 134.
[2] Scott *v.* Hanson, 1 R. & M. 128; Johnson *v.* Smart, 2 Giff. 151, *supra*, p. 82, 85.
[3] Stewart *v.* Alliston, 1 Mer. 26; Leyland *v.* Illingworth, 2 D. F. & J. 253.
[4] Martin *v.* Cotter, 3 J. & L. 496, 507; Drysdale *v.* Mace, 5 D. M. & G. 107; Swaisland *v.* Dearsley, 29 Beav. 430.
[5] Lord Brooke *v.* Roundthwaite, 5 Ha. 304.
[6] Sheard *v.* Venables, 36 L. J. Ch. 922.
[7] *Ib.*
[8] Martin *v.* Cotter, 3 J. & L. 506.

A purchaser cannot, however, on the application for specific performance, take advantage of small circumstances of variation in the description of the thing contracted for.[1] Although the description of the property, the subject-matter of the contract, may be inaccurate in some particulars, or may be different in some respects and in certain incidents from what it was represented to be, specific performance will be decreed if the property is not different in substance from what it was represented to be, and the misrepresentation has been made innocently or through mistake, and not wilfully, upon the terms of the vendor making good his representation or allowing or giving compensation.[2] If, for instance, the property be subject to incumbrances concealed from the purchaser, the seller may have specific performance on making good his assertion and redeeming those charges. So also, if the property is subject to a small rent not stated, or the rental is somewhat less than it was represented to be,[3] or if the property is smaller than it was represented to be,[4] or is not in the state and condition in which it was represented to be,[5] there may be specific performance on the terms of the vendor allowing a sufficient deduction or abatement from the purchase-money.[6] The principle on which the court proceeds in such cases is, that if the purchaser gets substantially that for which he has contracted, a slight variation or deficiency will not entitle him to recede from his contract when compensation can be made in money for the difference.[7] A purchaser cannot, however, be compelled, upon the

[1] Poole *v.* Shergold, 1 Cox, 274; Stewart *v.* Alliston, 1 Mer. 26.

[2] Howland *v.* Norris, 1 Cox, 59; Drewe *v.* Corp, 9 Ves. 368; Hill *v.* Buckley, 17 Ves. 394; Pulsford *v.* Richards, 17 Beav. 87, 96; Price *v.* Macaulay, 2 D. M. & G. 344.

[3] Pulsford *v.* Richards, 17 Beav. 87, 96, *per* Lord Romilly; Hughes *v.* Jones, 3 D. F. & J. 307. See Howland *v.* Norris, 1 Cox, 61; Pope *v.* Garland, 4 Y. & C. 394.

[4] Hill *v.* Buckley, 17 Ves. 395; Winch *v.* Winchester, 1 V. & B. 375; Portman *v.* Mill, 2 Russ. 570; King *v.* Wilson, 6 Beav. 124; Frost *v.* Brewer, 3 Jur. 165; Ayles *v.* Cox, 16 Beav. 23. Comp. Price *v.* North, 2 Y. & C. 620.

[5] Dyer *v.* Hargrave, 10 Ves. 508; Grant *v.* Munt, Coop. 173; Scott *v.* Hanson, 1 R. & M. 131.

[6] See further, Dart, V. & P. 694.

[7] Howland *v.* Norris, 1 Cox, 61; Dyer

principle of compensation, to take something substantially or materially different from that for which he contracted.[1] There can be no specific performance if the description be inaccurate, and the court feels that it cannot measure the difference between that which was promised and the actual fact, so as to found a proper basis for compensation.[2] If, for example, a man has contracted for the purchase of a freehold, he will not be compelled to take a leasehold (though held for a very long term),[3] or a copyhold;[4] nor can a man who has contracted for a copyhold be compelled to take a freehold;[5] nor will a man be compelled to take property held in a different manner from that which is expressed or implied in the contract, as the assignment of an underlease instead of an original lease,[6] or of a redeemable instead of an absolute interest,[7] or of an improved instead of a ground rent.[8] Nor can a man who has contracted for an estate in possession be compelled to a reversion expectant on a life estate,[9] or on a subsisting or *à fortiori* a reversionary lease.[10] Nor will a man, who has been led by the representations of the vendor to believe that the property, the subject of sale, was in the possession of a tenant of the vendor, be compelled to take a mere right of entry.[11] Nor can a man be compelled to take an estate where incumbrances or liabilities exist which would materially affect its enjoyment.[12] The court will not compel a man to take compensation for that which can hardly be estimated by pecuniary value.[13] Several

v. Hargrave, 10 Ves. 507; Magennis *v.* Fallon, 2 Moll. 588.

[1] Drewe *v.* Corp, 9 Ves. 368; Magennis *v.* Fallon, 2 Moll. 588.

[2] Lord Brooke *v.* Roundthwaite, 5 Ha. 298; Cox *v.* Coventon, 31 Beav. 388.

[3] Drewe *v.* Corp, 9 Ves. 368.

[4] Twining *v.* Morice, 2 Bro. C. C. 331; Hick *v.* Phillips, Prec. Ch. 575. See Earl of Durham *v.* Legard, 34 Beav. 612.

[5] Ayles *v.* Cox, 16 Beav. 23.

[6] Madeley *v.* Booth, 2 Deg. & S. 718.

[7] Coverley *v.* Burrell, Sug. V. & P. 299; Dart, V. & P. 689.

[8] Stewart *v.* Alliston, 1 Mer. 26.

[9] Collier *v.* Jenkins, You. 398.

[10] Linehan *v.* Cotter, 7 Ir. Eq. 176; Dart, V. & P. 689.

[11] Lachlan *v.* Reynolds, Kay, 54.

[12] Dart, V. & P. 690, 691.

[13] Dyer *v.* Hargrave, 10 Ves. 507; Magennis *v.* Fallon, 2 Moll. 588; Fewster *v.* Turner, 6 Jur. 144. See Knatchbull *v.* Grueber, 1 Madd. 153.

of the cases to be found in the books have carried the subject of compensation farther than at the present time it would be carried.[1]

When upon the sale of land, represented to consist of a certain specified number of acres, there proves to be a deficiency in quantity, such deficiency is properly the subject for compensation, if the deficiency be not too great. If the difference be great, there is no case for compensation. The party prejudiced by the error may, if he pleases, avoid the contract; but he cannot have specific performance unless he is willing to perform the contract without compensation.[2]

Conditions of sale providing for compensation in cases of error or mistake apply only to accidental slips, and not to cases where the subject-matter of the contract is materially different in substance from what it was represented to be.[3]

A false representation as to the value of property may be enough to induce the court to withhold specific performance.[4]

Mere inadequacy of consideration is not a ground for resisting specific performance;[5]* but if the inadequacy is very great, specific performance will not be decreed.[6]

[1] Howland *v.* Norris, 1 Cox, 61; Dyer *v.* Hargrave, 10 Ves. 507; Knatchbull *v.* Grueber, 1 Madd. 153; Magennis *v.* Fallon, 2 Moll. 588; Collier *v.* Jenkins, You. 298; Madeley *v.* Booth, 2 Deg. & S. 722.

[2] Earl of Durham *v.* Legard, 34 Beav. 612. See Price *v.* North, 2 Y. & C. 620.

[3] Stewart *v.* Alliston, 1 Mer. 26; Shackleton *v.* Sutcliffe, 1 Deg. & S. 620; Madeley *v.* Booth, 2 Deg. & S. 722; Ayles *v.* Cox, 16 Beav. 23; Dimmock *v.* Hallett, L. R. 2 Ch. App. 29. Comp. Leslie *v.* Tompson, 9 Ha. 268; Painter *v.* Newby, 11 Ha. 30.

[4] Buxton *v.* Lister, 3 Atk. 386; Shirley *v.* Stratton, 1 Bro. C. C. 440; Wall *v.* Stubbs, 1 Madd. 81.

[5] Abbott *v.* Sworder, 4 Deg. & S. 456; Bower *v.* Cooper, 2 Ha. 408; Borell *v.* Dann, *ib.* 440, *per* Wigram, V. C.; Haywood *v.* Cope, 25 Beav. 140.

[6] Falcke *v.* Gray, 4 Drew. 659.

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* When the parties stand upon equal grounds with equal means of information and not in any confidential relation and without any artifice practiced, inadequacy is no ground for refusing specific performance. Seymour *v.* Delancy, 3 Cow. 445; s. c. 6 Johns. Ch. 223; Harrison *v.* Tenn, 17 Mo. 237; Shepperd *v.* Bevis, 9 Gill. 32; Whiteford *v.* McLeod, 2 Bay, 380; Knobb *v.* Lindsay, 5 Ohio, 572.

If to any unfairness great inequality between price and value be added,

It is no defence to a bill for specific performance by the vendor that during the treaty he falsely assumed the character of agent for another, when in fact he was dealing on his own behalf, and that he thereby deceived the purchaser as to the party with whom he was dealing, provided the purchaser does not show that the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise.[1]

Though a written agreement, if there be no fraud or mistake, binds according to its terms, although verbally a provision was agreed on which has not been inserted in the document, either of the parties, if sued in equity for a specific performance of the agreement, is entitled to ask the court to remain neutral, unless the party suing him will consent to the performance of the omitted term.[2] As, for instance, when the vendor refused to perform his agent's engagement that improvements should be executed on the adjoining property;[3] or when the lessor of a house verbally promised the lessee before he executed the lease to put the house into complete repair.[4] But if the vendor offer to perform the agreement with, if the defendant so desire, the parol variation or addition, this is suf-

[1] Fellowes *v.* Lord Gwydyr, 1 R. & M. 83. See Nelthorpe *v.* Holgate, 1 Coll. 203.

[2] Clarke *v.* Grant, 14 Ves. 524; Winch *v.* Winchester, 1 V. & B. 378; Martin *v.* Pycroft, 2 D. M. & G. 795.

[3] Myers *v.* Watson, 1 Sim. N. S. 523, 529.

[4] Chappell *v.* Gregory, 34 Beav. 250.

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the contract will not be enforced. Cathcart *v.* Robinson, 5 Pet. 264; Burtch *v.* Hogge, 1 Harring. Ch. 31; Gargu *v.* Small, 2 Strobh. Eq. 72; Young *v.* Frost, 5 Gill. 287; Trigg *v.* Read, 5 Humph. 529.

Fluctuations in the value of property caused by events subsequent to the making of the contract, are no grounds for refusing specific performance if it was fair at the time it was made. Low *v.* Treadwell, 3 Fairf. 441.

The subsequent discovery of a mine is not, in the absence of fraud, a good ground for refusing specific performance. Bean *v.* Valle, 2 Mo. 126.

ficient, and the defendant cannot set up the want of a perfect written contract.[1] Specific performance will not, however, be decreed with the parol agreement superinduced upon it, unless the party praying for the specific performance has conducted himself with perfect good faith.[2]

As, on the one hand, a court of equity will not, at the suit of a vendor of property, enforce specific performance of a contract for the sale thereof, if the property is different in some material particulars from what it was represented to be, unless upon the terms of his allowing compensation, so, on the other hand, specific performance of a contract for the sale of property which has been inaccurately described through innocent mistake, will not be enforced at the suit of the purchaser, unless upon the terms of his submitting to allow compensation to the vendor.[3]

SECTION VIII.—PLEADING—PARTIES—PROOF.

PLEADING.

In suits instituted for the purpose of impeaching transactions on the ground of fraud, it is essential that the nature of the case should be distinctly and accurately stated. A mere general charge of fraud, without alleging specific facts, is not sufficient to sustain the bill. It must be shown in what the fraud consists, and how it has been effected. The fraud alleged must be set forth specifically in particular and in detail, so that the person against whom it is charged may have the opportunity of knowing what he has to meet and of shaping his de-

[1] Martin *v.* Pycrott, 2 D. M. & G. 785.
[2] Walters *v.* Morgan, 3 D. F. & J. 725.
[3] Leslie *v.* Tompson, 9 Ha 268; Painter *v.* Newby, 11 Ha. 30.

fence accordingly.[1]* Fraud is a conclusion of law; and it is wholly immaterial and insufficient to allege that an instrument has been obtained by fraud, unless the things done constituting the fraud are stated on the face of the bill.[2] If the transaction sought to be impeached be between solicitor and client or principal and agent, the bill should allege that the defendant was the solicitor or agent at the time of the purchase, if such be the ground on which his equity is based.[3] If the case is not so stated in the pleadings, evidence to prove it cannot be admitted.[4]† In imputing fraud against a man, the term itself need not be used: it is sufficient if the facts stated amount to a case of fraud.[5]

[1] East India Co. *v.* Henchman, 1 Ves. Jr. 287; Small *v.* Attwood, 6 Cl. & Fin. 233; Wilde *v.* Gibson, 1 H. L. 607; Sibson *v.* Edgeworth, 2 Deg. & Sm. 73; Munday *v.* Knight, 3 Ha. 497; Curzon *v.* Belworthy, 11 Jur. 916; Chadwick *v.* Chadwick, 18 Jur. 691; Kelly *v.* Rogers, 1 Jur. N. S. 514; Bothomley *v.* Squires, *ib.* 694; Bainbridge *v.* Moss, 3 Jur. N. S. 58; Robson *v.* Lord Devon, 4 Jur. N. S. 245; Irvine *v.* Kirkpatrick, 7 Bell, Sc. Ap. 186; National Exchange Co. *v.* Drew, 2 Macq. 120; Smith *v.* Kay, 7 H. L. 750; New Brunswick, &c., Railway Co. *v.* Conybeare, 9 H. L. 711.

[2] Gilbert *v.* Lewis, 1 D. J. & S. 38, 49, *per* Lord Westbury.

[3] Williams *v.* Llewellyn, 2 Y. & J. 68.

[4] *Ib.* See Montesquieu *v.* Sandys, 18 Ves. 301.

[5] Att.-Gen. *v.* Corporation of Poole, 4 M. & C. 28; Marshall *v.* Slodden, 7 Ha. 444; Bromley *v.* Smith, 26 Beav. 671.

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* Harding *v.* Handy, 11 Wheat. 103; Conway *v.* Ellison, 14 Ark. 360; Pendleton *v.* Galloway, 9 Ohio, 178; Spence *v.* Buren, 3 Ala. 231; Bell *v.* Henderson, 6 How. (Miss.) 311.

† Forey *v.* Clark, 3 Wend. 637; Fisher *v.* Boody, 1 Curt. 206; Thompson *v.* Jackson, 3 Rand. 504; Booth *v.* Booth, 3 Litt. 57.

In order to constitute the ground for relief against a contract, fraud must be distinctly averred, otherwise it will not be in issue. Gouverneur *v.* Elmendorf, 5 Johns. Ch. 79; Fitzpatrick *v.* Beatty, 1 Gilman, 454.

When the bill sets up a case of actual fraud, and makes that the ground for relief, the plaintiff will not be entitled to a decree by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. Eyre *v.* Potter, 15 How. 42.

A bill asking for a rescission of a contract need not aver that the plaintiff can restore the property. Veazie *v.* Williams, 8 How. 134.

An allegation of the facts and circumstances constituting fraud is suf-

A man who seeks equitable relief by injunction against fraud is not bound as the price of such interference to bring the whole matter into equity.[1] *

If a bill charges notice, it is sufficient to do so generally, without averring facts as evidence of the charge. It is not, however, necessary to charge notice in a bill to which a plea for valuable consideration without notice might be pleaded.[2]

A decree or order of the court may be impeached for fraud by original bill.[3]

There may be a prayer in the bill that certain transactions may be declared fraudulent, and also an alternative prayer for relief, upon the supposition of such transactions not being set aside on the ground of fraud.[4]

It is not necessary that there should be an express prayer in the bill that a transaction should be set aside for fraud. A transaction will be set aside for fraud under the prayer for general relief.[5]

[1] Stewart *v.* Great Western Railway Co., 2 D. J. & S. 319.
[2] Hughes *v.* Garner, 2 Y. & C. 328.
[3] Brooke *v.* Lord Mostyn, 2 D. J. & S. 373.
[4] Bowen *v.* Evans, 2 H. L. 280. See Bennett *v.* Vade, 9 Mod. 312; Cruikshank *v.* M'Vicar, 8 Beav. 106.
[5] Williams *v.* Smith, 7 L. J. Ch. 129.

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ficient without charging fraud by name. Kennedy *v.* Kennedy, 2 Ala. 571; Skrine *v.* Simmons, 11 Geo. 401; Farnam *v.* Brooks, 9 Pick. 212.

A bill alleging fraud cannot be supported by proof of mistake, but the facts may be so alleged that relief may be granted on the latter ground. Stebbins *v.* Eddy, 4 Mason, 414; Smith *v.* Babcock, 2 Wood & Min. 246; White *v.* Denman, 1 Ohio St. R. 110; Williams *v.* Sturdevant, 27 Ala. 598.

When a party seeks to avoid the statute of limitations on the ground of fraud, the bill must be specific in stating the facts which constitute the fraud and the time when it was discovered. Moore *v.* Green, 19 How. 69; Sterns *v.* Page, 7 How. 819; Beaubien *v.* Beaubien, 23 How. 190; Badger *v.* Badger, 2 Wall. 87; Williams *v.* First Presbyterian Society, 1 Ohio St. R. 478.

* A party who has bought land and been let into possession, and who seeks to enjoin a suit for the purchase money on the ground of fraud or failure of title, must pray for a rescission of the contract. Markham *v.* Todd, 2 J. J. Marsh. 367; Williamson *v.* Raney, 1 Freeman, 112.

If a case of fraud is alleged in respect of the formation of a company, it must be set up by bill, and not by proceedings under a winding-up order.[1]

A defendant is not justified in omitting to demur to a bill on the ground that it contains charges of fraud against him.[2] *

Assignees of a bankrupt cannot at the hearing insist on a case of fraudulent preference, unless they have raised it in the pleadings.[3]

When the same person has been induced to part with his property at an undervalue at two different times, through the misrepresentations of two different agents of the same principal, one bill may be brought to set aside both transactions, although in themselves wholly distinct, and the same will not be demurrable for multifariousness.[4]

If a case of fraud be presented, a bill is not demurrable

[1] Leifchild's Case, L. R. 1 Eq. 231.
[2] Nesbitt *v.* Berridge, 11 W. R. 446; 1 N. R. 345. Comp. Bothomley *v.* Squires, 1 Jur. N. S. 694.
[3] Holderness *v.* Rankin, 2 D. F. & J. 258.
[4] Walsham *v.* Stainton, 1 D. J. & S. 678.

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* An allegation of fraud in a bill must be answered, and a general demurrer cannot be allowed. The allegation of fraud must be denied by answer, whatever defence may be adopted as to other parts of the bill. Stovals *v.* Northern Bank of Mississippi, 5 Smed. & Mar. 17; Ross *v.* Vestner, 1 Freeman's Ch. 587; Niles *v.* Anderson, 5 How. (Miss.) 365.

If the defendant pleads to a bill containing an allegation of fraud, he must still deny the fraud by answer as well as by averment in the plea. Niles *v.* Anderson, 5 How. (Miss.) 365; Crawley *v.* Timberlake, 1 Ired. 346.

A plea at law setting forth the facts without averring fraud, is insufficient. Clark *v.* Partridge, 2 Burr. 13.

A plea at law containing a general allegation of fraud, without setting forth the facts, is insufficient. Giles *v.* Williams, 3 Ala. 316; Clay *v.* Dennis, 3 Ala. 375; Hynson *v.* Dunn, 5 Pike, 395; Pemberton *v.* Staples, 6 Mo. 59; *contra*, Hoitt *v.* Holcomb, 23 N. H. 535.

When the facts set forth in a plea at law do not constitute fraud, the intention to defraud must be averred. Fraud consists in the intention. Moss *v.* Riddle, 5 Cranch, 351.

merely as being brought for the recovery of money.[1] In Colt *v.* Woollaston[2] it was held that persons, who had been induced by misrepresentation on the part of the promoters of a public company to subscribe for shares, may obtain their money back by a bill in equity, although an action at law might have been brought for the same purpose with success. This doctrine has ever since been recognized as correct, and it has been frequently acted on.[3] So also a bill averring a combination of several defendants, against some of whom the plaintiff may have a direct remedy at law, while against others he may have no remedy at law, or no remedy except by as many actions of deceit as there are parties defendants to the suit, is maintainable;[4] though a bill of the same sort against a single individual would be demurrable,[5] except, perhaps, in cases where the amount of damage was ascertained, or capable of being easily ascertained.[6]

The defence of purchase for value without notice cannot be admitted, unless it is pleaded.[7]*

When a party relies upon the plea, he must, in his plea, aver expressly that the person who conveyed was seised, or pretended to be seised, when he executed the conveyance, and that he was in possession, if the conveyance purported an immediate transfer of the possession at the time when he executed the deed.[8] It must aver the consideration,[9] and actual payment of it. A consideration secured to be paid is not suffi-

[1] Ingram *v.* Thorpe, 7 Ha. 67; Barry *v.* Crosskey, 2 J. & H. 1.

[2] 2 P. Wms. 154.

[3] Green *v.* Barrett, 1 Sim. 45; Blair *v.* Agar, 2 Sim. 289; Stainbank *v.* Fernley, 9 Sim. 556; Cridland *v.* De Mauley, 1 Deg. & Sm. 459; Beeching *v.* Lloyd, 3 Drew. 227; Henderson *v.* Lacon, L. R. 5 Eq. 262; but see Thompson *v.* Barclay, 9 L. J. Ch. 219, *per* Lord Brougham.

[4] Barry *v.* Crosskey, 2 J. & H. 30.

[5] *Ib.*

[6] Ingram *v.* Thorpe, 7 Ha. 67.

[7] Lyne *v.* Lyne, 27 L. T. 268; Philipps *v.* Philipps, 31 L. J. Ch. 321.

[8] Jackson *v.* Rowe, 4 Russ. 514, Mitf. Plead. 320. See as to case where purchase is of a reversion, Hughes *v.* Garth, Ambl. 421.

[9] Millard's Case, 2 Freem. 43; Wagstaff *v.* Read, 2 Ch. Ca. 156.

* Snelgrove *v.* Snelgrove, 4 Dessau, 274; High *v.* Batte, 10 Yerg. 335.

cient.[1] The plea must also deny notice of the plaintiff's title or claim previous to the execution of the deeds and payment of the consideration,[2] * and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title.[3]

Notice must be denied whether it be charged in the bill or not.[4]† Notice must be denied by way of averment in the plea, otherwise the fact of notice will not be in issue.[5] But it is sufficient to deny notice generally; for it is not the office of a plea to deny particular facts, unless they are specially charged as evidence of notice. If, however, particular facts are specially charged as evidence of notice, the plea must be accompanied by an answer denying the facts as specially and particularly as they are charged in the bill, so that the plaintiff may be at liberty to except to its sufficiency.[6]

[1] Hardingham *v.* Nicholls, 3 Atk. 304; Molony *v.* Kernan, 2 Dr. & War. 31, Mitf. Plead. 320.

[2] Moore *v.* Mayhow, 1 Ch. Ca. 34; Tourville *v.* Naish, 3 P. Wms. 307, Mitf. Plead. 320.

[3] Kelsall *v.* Bennett, 1 Atk. 522, Mitf. Plead. 321.

[4] Aston *v.* Curzon, 3 P. Wms. 244 (n.) f.; Brace *v.* Duchess of Marlborough, 2 P. Wms. 491; Hughes *v.* Garner, 2 Y. & C. 328.

[5] Harris *v.* Ingledew, 3 P. Wms. 94, Mitf. Plead. 321.

[6] Pennington *v.* Beechey, 2 Sim. & St. 282; Ovey *v.* Leighton, *ib.* 234; Hardman *v.* Ellames, 5 Sim. 650; 2 M. & K. 732; Kennedy *v.* Green, 6 Sim. 7; Lord Portarlington *v.* Soulby, 7 Sim. 23; Gordon *v.* Shaw, 14 Sim. 393.

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* Boone *v.* Chiles, 10 Pet. 177; Galatian *v.* Erwin, 1 Hopk. 48; Brinkerhoff *v.* Lansing, 4 Johns. Ch. 65; Harris *v.* Fly, 7 Paige, 421; Nantz *v.* McPherson, 7 Mon. 597; Jenkins *v.* Bodley, 1 Smed. & Mar. Ch. 338.

† Manhattan Co. *v.* Evertson, 6 Paige, 457; Woodruff *v.* Cook, 2 Edw. Ch. 259; Frost *v.* Beekman, 1 Johns. Ch. 288; Leftwich *v.* Orne, 1 Freeman Ch. 207; Wilson *v.* Hillyer, Saxton, 63; Moore *v.* Clay, 7 Ala. 742; Herring *v.* Winans, 1 Smed. & Mar. Ch. 466; Baynard *v.* Norris, 5 Gill. 468.

The defence may be raised by answer as well as by plea. Donnell *v.* King, 7 Leigh, 393; Baynard *v.* Norris, 5 Gill. 468.

The fact of notice, and the knowledge of every circumstance from which notice can be inferred must be denied. Murray *v.* Ballou, 1 Johns. Ch. 566; Leftwich *v.* Orne, 1 Freem. Ch. 207; Wilson *v.* Hillyer, Saxton, 63.

Where a purchaser with notice relies upon the ignorance of a prior

If a purchaser without notice neglects to protect himself by plea, he may defend himself by answer,[1] but if he submits to answer, he must answer fully, although he might by demurrer or plea have protected himself.[2] A defendant, who puts in answer but does not set up the defence of purchase for value without notice, cannot afterward insist on that defence.[3]

PARTIES.

The heir at law of a person seised in fee, may maintain a suit to set aside a transaction into which his ancestor has been induced, by fraud, to enter.[4] * He is not precluded from suing to set aside the sale, by the circumstance of the party defrauded having, by will, bequeathed to a third party the balance of the purchase money remaining due at his death.[5] If, however, the bill alleges that the purchase money is unpaid, the personal representatives must be made parties, as being interested in maintaining the validity of the contract.[6]

The executor of a party defrauded may file a bill to have a transaction set aside.[7] So, also, may a devisee file a bill to set aside a transaction which has been fraudulently obtained from his testator. The heir at law is not a necessary party.[8]

[1] Att.-Gen. *v.* Wilkins, 17 Beav. 285, 291.
[2] Lancaster *v.* Evors, 1 Ph. 352.
[3] Philipps *v.* Philipps, 31 L. J. Ch. 321.
[4] Bellamy *v.* Sabine, 2 Ph. 425; Holman *v.* Loynes, 4 D. M. & G. 270; Gresley *v.* Mousley, 4 D. & J. 78; Clark *v.* Malpas, 31 Beav. 88, 31 L. J. Ch. 696; Longmate *v.* Ledger, 2 Giff. 157.
[5] Bellamy *v.* Sabine, 2 Ph. 425.
[6] Wilkinson *v.* Fowkes, 9 Ha. 193.
[7] Walsham *v.* Stainton, 1 D. J. & S. 678.
[8] Uppington *v.* Bullen, 2 Dr. & War. 184; Harrison *v.* Guest, 6 D. M. & G. 424.

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purchaser, through whom the title has passed, he must aver want of notice in his grantor, and such denial may be made on information and belief. Griffith *v.* Griffith, 9 Paige, 315; Gallatian *v.* Cunningham, 8 Cow. 361; Woodruff *v.* Cook, 2 Edw. Ch. 259; Galatian *v.* Erwin, 1 Hopk. 48.

* A fraud is an individual and personal thing, and does not form a claim on behalf of a stranger to the transaction not claiming under the party defrauded. Comstock *v.* Ames, 3 Keyes, 357; Beesley *v.* Hamilton, 5 Ill. 88.

So, also, may a remainder man, under a settlement, file a bill to set aside a transaction, into which his predecessor in title, under the settlement, has been induced by fraud to enter.[1] If fraud has been practiced on a tenant in tail, and has been carried into effect by barring the entail, and he dies without issue, and without confirming the transaction, the next remainder man may file a bill to set it aside; but not, if there were an independent intention to bar the entail, and the fraud applied only to some part of the transaction, distinct from that object.[2]

If several persons have been induced, by false and fraudulent representations, to take shares in, or subscribe to, an undertaking, each one may institute a suit on his own behalf for a rescission of the contract, or for a return of the moneys which he has advanced. It is not necessary that the other persons defrauded should be parties to the suit, or be represented therein.[3] In Macbride *v.* Lindsay,[4] where a bill was filed by a man, who alleged that he had been induced by the fraudulent representations of the directors of a company to become a member of the company, praying, amongst other things, a return of the money, a demurrer was allowed on the ground that the fraud of which the plaintiff complained gave him no right to rescind his contract, except a right common to himself, and others who were not represented in the suit. So, also, it was considered in Beeching *v.* Lloyd,[5] that the subscribers to a company have such a community of interest in the funds subscribed, as to entitle them to sue jointly for their return.[6] But these cases cannot be reconciled with some very recent

[1] Ward *v.* Hartpole, 3 Bligh, 490; Brydges *v.* Branfil, 12 Sim. 369.

[2] Bellamy *v.* Sabine, 2 Ph. 425. See Tarleton *v.* Liddell, 17 Q. B. 390.

[3] Colt *v.* Woollaston, 2 P. Wms. 154; Green *v.* Parrett, 1 Sim. 45; Cridland *v.* De Mauley, 1 Deg. & Sm. 459; Central Railway Company of Venezuela *v* Kisch, L. R. 2 App. Ca. 112; Smith's Case, *Re* Reese Silver Mining Co., L. R. 2 Ch. App. 604.

[4] 9 Ha. 574.

[5] 3 Drew. 242.

[6] See Williams *v.* Smith, 7 L. J. Ch. 129.

cases, in which it has been held that a man, who has been induced by false representations in the prospectus of a company to take shares in the company, may maintain a suit on his own behalf against the company and its directors, for a rescission of his contract to take shares.[1] The law, therefore, upon this subject, must be considered as still open to discussion, but the better opinion would seem to be, that each person, who has been defrauded, has a distinct and separate ground of relief, and that, therefore, a suit by one of them on behalf of himself and the others, is irregular, and cannot be maintained.[2]

A suit may, however, be properly instituted by one or some of a number of partners, on behalf of himself, or themselves, and all others whose interest is identical with his or their own, when the object of the suit is to make an officer of the company account for a secret benefit or advantage obtained by him, in breach of the good faith owing to those whose affairs he conducts;[3] or to rescind a contract into which the partnership has been induced to enter, by false and fraudulent representations.[4]

The right to bring an action of deceit at law, or to have relief in equity, on the ground of misrepresentation, is not confined to the person to whom the false representation has been made, but extends to third persons, provided it appear that the representation was made with the intent that it should be acted on by such third persons, or by the class of persons to whom they may be supposed to belong, in the manner that occasions the loss or injury.[5]

[1] Central Railway Co. of Venezuela *v.* Kisch, L. R. 2 App. Ca. 112; Smith's Case, Re Reese River Silver Mining Co. L. R. 2 Ch. App. 604.

[2] Jones *v.* Garcia del Rio, T. & R. 297; Crosskey *v.* Bank of Wales, 4 Giff. 314.

[3] Hichens *v.* Congreve, 4 Russ. 562; Taylor *v.* Salmon, 4 M. & C. 134; Benson *v.* Heathorn, 1 Y. & C. C. C. 326; Lund *v.* Blanshard, 4 Ha. 9; Beck *v.* Kantorowicz, 3 K. & J. 230; Attwood *v.* Merryweather, 37 L. J. Ch. 35.

[4] See Small *v.* Attwood, You. 407.

[5] Clifford *v.* Brooke, 13 Ves. 132; Langridge *v.* Levy, 2 M. & W. 519; Longmeid *v.* Holliday, 6 Exch. 761; Bedford *v.* Bagshaw, 4 H. & N. 538; Blakemore *v.* Bristol and Exeter Railway Co. 8 E. & B. 1035; National Ex-

A party, partially interested in an estate, may maintain a suit to set aside a conveyance of such interest fraudulently obtained from him, without making the other parties interested in the estate parties.[1]

It is a general rule that a court of justice will not interpose actively in favor of a man who is *particeps criminis* in an illegal or fraudulent transaction.[2]* The court will take the objection as to the illegality of the transaction, even although the defendant himself does not.[3] Where both parties are equally offenders against the law, the maxim *potior est conditio possidentis*, prevails, not because the defendant is more favored, where both are equally criminal, but because the plaintiff is not permitted to approach the altar of justice with unclean hands.[4]† If, accordingly, a deed has been executed, or a conveyance made, to enable a party to contravene the provisions of an act of Parliament, no suit in equity will lie to set aside the deed or recover the estate. The party executing

change Co. *v.* Drew, 2 Macq. 103; Scott *v.* Dixon, 29 L. J. Exch. 63 n.; Bagshaw *v.* Seymour, 18 C. B. 903; Davidson *v.* Tulloch, 3 Macq. 783; Barry *v.* Crosskey, 2 J. & H. 1.

[1] Henley *v.* Stone, 3 Beav. 355.

[2] Cecil *v.* Butcher, 2 J. & W. 572; Doe *v.* Roberts, 2 B. & Ald. 369; Bateman *v.* Ramsey, San. & Sc. 459; Hamilton *v.* Ball, 2 Ir. Eq. 191, 194; M'Kinnell *v.* Robinson, 3 M. & W. 439; Barnard *v.* Sutton, 7 Jur. 685, *per* Lord Lyndhurst.

[3] Hamilton *v.* Ball, 2 Ir. Eq. 191, 194.

[4] Nellis *v.* Clark, 4 Hill. (Amer.), 426.

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* Creath *v.* Sims, 5 How. 192; Nellis *v.* Clarke, 20 Wend. 24; Boyd *v.* Barclay, 1 Ala. 34; Warburton *v.* Aiken, 1 M'Lean, 460; Wheeler *v.* Sage, 1 Wall. 518; Wyatt *v.* Ayers, 2 Port. 157; Randall *v.* Howard, 2 Blackf. 585; Hannay *v.* Eve, 3 Cranch. 242; Bartle *v.* Natt, 4 Pet. 184; Sims *v.* Steele, 5 Munf. 29; Steele *v.* Worthington, 2 Ohio, 182.

Although the parties have been engaged in business, either *malum in se*, or merely prohibited by law, yet if the cause of action is unconnected with the illegal act, and is founded upon a distinct and collateral consideration, it will not be affected by their former conduct. Phalen *v.* Clark, 19 Ct. 421.

† Bolt *v.* Rogers, 3 Paige, 154; Furris *v.* Dunham, 5 Mon. 397: Lucas *v.* Mitchell, 2 A. K. Marsh. 244; M'Clure *v.* Purcell, 3 A. K. Marsh. 61; Cunningham *v.* Shields, 4 Hey. 44.

it cannot be heard to allege his own fraudulent purpose. He is estopped from confining the operation of his deed within the limits of his intended fraud.[1] In a case where a man, in order to give his brother a colorable qualification to kill game, conveyed some land to him, it was held that his widow could not avoid the conveyance in an action of ejectment against her by the brother.[2] So, also, if a man, with a view of defeating his creditors, makes a conveyance of his real and personal estate to another, no suit is, in general, maintainable by him against that other for the recovery of the property.[3] *

A distinction has been taken between cases where a deed executed, or a conveyance made, for an illegal purpose, has performed its office, and been accompanied by the completion of the purpose, and cases where the deed or conveyance has not been used for the purpose for which it was executed. In

[1] Curtis *v.* Perry, 6 Ves. 747; Brackenbury *v.* Brackenbury, 2 J. & W. 391; Cecil *v.* Butcher, *ib.* 572; Groves *v.* Grooves, 3 Y. & J. 163; Comp. Childers *v.* Childers, 1 D. & J. 482; Davies *v.* Otty, 35 Beav. 208.

[2] Doe *v.* Roberts, 2 B. & Ald. 369. See Philpotts *v.* Phillpotts, 10 C. B. 85.

[3] Nellis *v.* Clark, 4 Hill. (Amer.) 426; Ford *v.* Harrington, 2 Smith (Amer.), 285; Comp. Barnard *v.* Sutton, 7 Jur. 685.

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* Fitzgerald *v.* Forristal, 48 Ill. 228; White *v.* White, 5 J. J. Marsh. 444; Bryant *v.* Mansfield, 22 Me. 360; Dorsy *v.* Smithson, 6 H. & J. 61; Osborne *v.* Moss, 7 Johns. 161; Coltrains *v.* Causey, 3 Ired. 246; Stickney *v.* Bosman, 2 Barr, 67; James *v.* Bird, 8 Leigh. 510; Warren *v.* Hall, 6 Dana, 450; Buehler *v.* Gloninger, 2 Watts, 226.

A suit may be maintained upon notes given as consideration for a fraudulent conveyance. Stanton *v.* Green, 34 Miss. 576.

Ejectment may be maintained by the fraudulent grantee. Stark *v.* Littlepage, 4 Rand. 368.

A note secured by a fraudulent mortgage cannot be enforced against the maker. Walker *v.* McConnico, 10 Yerg. 228.

No suit in equity is maintainable by the grantee against the grantor. Mason *v.* Baker, 1 A. K. Marsh, 208.

Equity will not lend its aid to enforce a mortgage given for a fictitious debt, in order to defraud creditors. Jones *v.* Comer, 5 Leigh. 350.

Although the mortgage is void, the original debt may be recovered. Haven *v.* Low, 2 N. H. 13.

Platamone *v.* Staple,[1] the Vice-Chancellor appears to have considered, that the circumstance of the purpose for which the deed was made not having been accomplished, made a material distinction.[2] But the distinction does not seem sound. If a grantor, so far as he can, completes the transaction for an illegal purpose, and leaves it in the power of the grantee to make at his pleasure the illegal use of the instrument originally intended, he merits the consequences attached to the illegality of his act.[3] It is difficult to see upon what principle it can be contended that a man, who intends to commit a fraud, shall not have relief if he succeed in his attempt, but shall be relieved if he fails or hesitates to proceed, because he fears a failure. His intention is as fraudulent in the one case as in the other.[4]

A distinction has also been taken between cases where the conveyance has been made with the privity of, or the deed has been delivered to, the grantee, and cases where the conveyance has not been communicated to the grantee, nor the deed parted with by the grantor.[5] But there is a preponderance of authority in support of the proposition that, although a voluntary deed is made without the knowledge of the grantee, and has been kept in the hands of the grantor, a court of equity will not relieve against it.[6] In Brackenbury *v.* Brackenbury,[7] the grantor had never parted with the possession of the deed, nor had it been used for the fraudulent purpose with a view to which it was executed. After the death of the grantor, the grantee obtained possession by deceit, and under a promise to return it immediately, yet the court refused to relieve. Inas-

[1] Coop. 251.
[2] See Barnard *v.* Sutton, 7 Jur. 685.
[3] Cecil *v.* Butcher, 2 J. & W. 578; Doe *v.* Roberts, 2 B. & Ald. 369; Roberts *v.* Roberts, Dan. 143; Groves *v.* Groves, 3 Y. & J. 163. See Brackenbury *v.* Brackenbury, 2 J. & W. 391.
[4] Bateman *v.* Ramsay, San. & Sc. 478.
[5] Ward *v.* Lant, Prec. Ch. 182; Birch *v.* Blagrave, Amb. 264; Groves *v* Groves, 3 Y. & J. 163.
[6] Cecil *v.* Butcher, 2 J. & W. 578.
[7] *Ib.* 391.

much as it is well established law that a man who executes a voluntary settlement passes the estate out of himself, though he retains the deed in his own possession,[1] it is impossible to contend that the distinction attempted to be made is a sound one.

The rule that a court of justice will not actively interpose in favor of a man who is *particeps criminis* in an illegal or fraudulent transaction, like most other general rules, admits of exceptions. An exception to the rule takes place where the party seeking relief, although *particeps criminis*, is not *in pari delicto* with his associate in the matter. There may be, and often are, very different degrees of guilt of parties who concur in an illegal act. One party may act under circumstances of oppression, imposition, undue influence, of great inequality of age or condition, so that his guilt may be far less in degree than that of the other party.[2] *

Other cases which form an exception to the general rule are cases where the act or deed in which the parties concur is against the principles of morality or public policy. In such cases there may be on the part of the court itself a necessity of supporting the public interest or policy, however reprehen-

[1] Roberts *v.* Williams, 4 Ha. 130.

[2] Smith *v.* Bromley, 2 Doug. 696 n.; Bosanquet *v.* Dashwood, Ca. t. Talb. 41; Browning *v.* Morris, Cowp. 790; Osborne *v.* Williams, 18 Ves. 379; Palmer *v.* Wheeler, 2 Ba. & Be. 31; Reynell *v.* Sprye, 1 D. M. & G. 678, 679.

* Freelove *v.* Cole, 41 Barb. 318; Prewitt *v.* Copwood, 30 Miss. 369; Austin *v.* Winston, 1 Hen. & M. 33; Dismukes *v.* Terry, Walk. 197; Dertley *v.* Murphy, 3 A. K. Marsh, 472; Long *v.* Long, 9 Md. 348.

The rule does not apply to a case where the defendant first conceived the fraud for his own benefit, and, either by his artifice or influence, induced the complainant to concur. Cook *v.* Collyer, 2 B. Mon. 71.

If a person is *capax doli*, or rather, *capax fraudis*, the rule applies, although the other party is greatly superior in intellect and of more prudent habits, for, as there is no rule by which a court of equity can measure the grades of intellect of different men possessed of legal capacity, it must hold them to be of equal capacity. Smith *v.* Elliot, 1 Pat. & Heath. 307.

sible the conduct of the parties themselves may be.[1]* Although, for instance, a court of equity will not relieve a man who assigns property to another with the view of defeating his creditors, the case is different if the person who assigns the property is a client, and the person to whom it has been assigned is his attorney. The rule of public policy which prohibits an attorney from obtaining any advantage in transactions must prevail, and the attorney must reconvey the property.[2] So, also, the purchase of a bankrupt's estate secretly, by a person for the benefit of the solicitor to the assignees was set aside at the suit of the bankrupt, after his bankruptcy had been annulled, though there was evidence to show that the bankrupt had been privy to the transaction.[3]

When a party to an illegal or immoral contract comes himself to be relieved from that contract, or its obligations, he must distinctly and conclusively state such grounds of relief as the court can legally attend to. He should not accompany his claims to relief, which may be legitimate, with claims and complaints, which are contaminated with the original immoral purpose.[4] A distinction will be taken between cases where a party has actually accomplished the bad purpose to which a deed was auxiliary, and cases in which he had not participated in the bad purpose which it was the very object of the deed to procure.[5] In Sismey *v.* Eley,[6] where a plaintiff sought to be relieved from a deed by which he had agreed to pay an annuity to a woman, on the ground that the consideration for it was a promise made to him to live with him as his mistress,

[1] Law *v.* Law, Ca. t. Talb. 140; St. John *v.* St. John, 11 Ves. 535.
[2] Ford *v.* Harrington, 2 Smith (Amer.) 285.
[3] Adams *v.* Sworder, 2 D. J. & S. 44.
[4] Batty *v.* Chester, 5 Beav. 103.
[5] Smyth *v.* Griffin, 13 Sim. 254; Benyon *v.* Nettlefold, 17 Sim. 56.
[6] *Ib.* 1.

* Ford *v.* Harrington, 16 N. Y. 285; Grimes *v.* Hoyt, 2 Jones' Eq. 271; Johnson *v.* Cooper, 2 Yerg. 524.

a demurrer to the bill was overruled, as it did not appear that the plaintiff had availed himself of the promise.

A distinction is taken in equity between enforcing illegal contracts, and asserting title to moneys arising from an illegal contract. If the transaction alleged to be illegal is completed and closed, so that it will not be in any manner affected by what the court is asked to do, the party to the transaction, who has possessed himself of the moneys arising out of the transaction, cannot be permitted to set up the illegality of the transaction against the otherwise clear title of the other. One of two partners, or joint adventurers, therefore, who has possessed himself of the property, common to both, cannot be permitted to retain it, by merely showing that in realizing it some provisions in an act of Parliament, or in the fiscal law of a foreign state, may have been violated.[1] So, also, and upon a similar principle, if two trustees are equally guilty of a breach of trust, but one has received the moneys, the other may maintain a bill against him to recover the amount.[2]

In all cases of fraud, the hand of the court is not arrested by the death of the wrongdoer; but the same relief shall be had against his executors, and satisfaction will be given out of his estate after his death.[3] The fact of the survivor of two partners having been sued at law, will not free the estate of the deceased partner from liability in equity, where alone that estate can be reached.[4] The estate of a deceased partner of a firm of solicitors is liable for a fraud committed by the surviving partner.[5]

A third party who has been privy to a fraud, may be made

[1] Sharp *v.* Taylor, 2 Ph. 801; M'Blair *v.* Gibbes, 17 How. (Amer.) 232. See also Nash *v.* Ash, 1 Eden. 378; Mince *v.* Peters, Harg. MSS. No. 112, p. 86; Watts *v.* Brooks, 3 Ves. 612; Knowles *v.* Houghton, 11 Ves. 168.

[2] Baynard *v.* Woolley, 20 Beav. 583.

[3] Garth *v.* Cotton, 3 Atk. 757; Curtis *v.* Curtis, 2 Bro. C. C. 620; Falkner *v.* O'Brien, 2 Ba. & Be. 221; Ingraham *v.* Thorp, 7 Ha. 67; Rawlins *v.* Wickham, 3 D. & J. 304; Greeley *v.* Mousley, 4 D. & J. 78; Walsham *v.* Stainton, 1 D. J. & S. 690.

[4] Rawlins *v.* Wickham, 3 D. & J. 322.

[5] Sawyer *v.* Goodwin, 36 L. J. Ch. 578.

a party to the bill.[1] If third parties have aided the directors of a company in misapplying the funds of the company, a bill seeking relief both against them and the directors is not multifarious.[2] So, also, a man who has been guilty of a fraud, in concert with one of several trustees, may be joined in a bill for relief against the trustees generally.[3] If a man has abetted a fraud, the absence of a personal benefit resulting from it is no excuse; he may be justly made responsible for its results, and even if no other relief can be had against him, he may be compelled to pay the costs of the suit.[4] Solicitors, or attorneys, who have abetted their clients in a fraud, or have prepared deeds to carry it out, may be made parties to a bill, to set the fraudulent transaction aside, and are liable to pay the costs, even though they may have derived no personal benefit therefrom.[5] A solicitor, who is implicated in a case of fraud, may be made a party to a bill seeking relief in respect of that fraud, merely for the purposes of discovery, the only relief asked being that he should be ordered to pay costs.[6] The case of course is all the stronger, if the solicitor has gained a personal benefit from a fraudulent transaction into which he has induced his client to enter.[7]

A person filling a position of a fiduciary character, as an agent, is liable for a breach of duty, though he may have derived no benefit from it. Where two agents concur in a fraud, and one of them only derives benefit from the fraud, the other is also liable in equity for the benefit so derived.[8] Those who, having a duty to perform, represent to others, who are interested in the performance of it, that it has been per-

[1] Turquand *v.* Knight, 14 Sim. 644; Lund *v.* Blanshard, 4 Ha. 9; Charlton *v.* Coombs, 4 Giff. 385.

[2] Lund *v.* Blanshard, 4 Ha. 9.

[3] Att.-Gen. *v.* Cradock, 3 M. & C. 85.

[4] Seddon *v.* Connell, 10 Sim. 85.

[5] Bowles *v.* Stewart, 1 Sch. & Lef. 227; Beadles *v.* Burch, 10 Sim. 332; Berry *v.* Armitstead, 2 Keen, 227. See Cory *v.* Eyre, 1 D. J. & S. 167.

[6] Gilbert *v.* Lewis, 1 D. J. & S. 52.

[7] Bennett *v.* Vade, 2 Atk. 327; Proctor *v.* Robinson, 35 Beav. 335. See Brent *v.* Brent, 10 L. J. Ch. 84.

[8] Walsham *v.* Stainton, 1 D. J. & S. 678.

formed, make themselves responsible for all the consequences of the non-performance.[1]

If a man has been induced by the false representations or fraud of a particular shareholder in a company to purchase shares, the only necessary party to a bill filed for the return of purchase-money and for an indemnity, is the person who sold the shares.[2]

It is not necessary that all the parties charged with fraud should be made parties.[3]

A man who has released the principal actor in a fraud, cannot go on against the other parties who would have been liable only in a secondary degree.[4]

In a suit to set aside a settlement of real and personal estate for fraud, or undue influence on the part of the trustees, one or more of the parties beneficially interested is or are necessary parties.[5]

A partner, being liable for the fraud of his copartner, when acting within the proper scope of the partnership business,* a firm of bankers or solicitors is liable for fraud practiced upon a client by a member of the firm.[6] The client, or principal, is entitled to relief against the other partners, not only if the case is one in which he might have recovered

[1] Blair *v.* Bromley, 2 Ph. 360.
[2] Stainbank *v.* Fernley, 9 Sim. 556; Mare *v.* Malachy, 1 M. & C. 559; Turner *v.* Hill, 11 Sim. 1.
[3] Seddon *v.* Connell, 10 Sim. 79.
[4] Thompson *v.* Harrison, 2 Bro. C. C. 164; 1 Cox, 346.
[5] Read *v.* Prest, 1 K. & J. 183.
[6] Brydges *v.* Branfill, 12 Sim. 369; Sadler *v.* Lee, 6 Beav. 330; Blair *v.* Bromley, 5 Ha. 542, 2 Ph. 354; St. Aubyn *v.* Smart, L. R. 5 Eq. 183.

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* Locke *v.* Stevens, 1 Met. 560.

Two joint owners are proper parties to a suit for a misrepresentation by one who was employed to sell the joint property. White *v.* Sawyer, 16 Gray, 586.

A joint action may be maintained against two persons, if both made false representations at the time of the sale, although one only was interested in the property. Stiles *v.* White, 1 Met. 356.

against such other partners, but also if the remedy at law against the other partners is barred by lapse of time.[1] The original liability of one partner for the fraud of a copartner is continued as well after as before the dissolution of the partnership.[2] A fraud, however, committed by a partner whilst acting on his own separate account, is not imputable to the firm, although, had he not been connected with it, he might not have been in a position to commit the fraud.[3]

The infancy of the defrauding party will not exempt him, for though the law protect him from binding himself by contract, it gives him no authority to cheat others.[4]

A suit which has been instituted for the purpose of setting aside a transaction on the ground of fraud, will not fail merely because the bill may have incorrectly and untruly alleged a third person to have been a participator and joint actor in the fraud, although such incorrect mode of stating the case may affect the costs.[5]

PROOF.

A man who alleges fraud must clearly and distinctly prove the fraud he alleges. The *onus probandi* is upon him to prove his case as it is alleged by the bill.[6] If the fraud is not strictly and clearly proved, as it is alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings.[7] Fraud will not be carried by way of relief one tittle beyond the manner in

[1] Blair *v.* Bromley, 2 Ph. 354.

[2] *Ib.*

[3] *Ex-parte* Eyre, 1 Ph. 227; Coomer *v.* Bromley, 5 Deg. & Sm. 532; Bishop *v* Countess of Jersey, 2 Drew. 143.

[4] Evroy *v.* Nicholas, 2 Eq. Ca. Ab. 488; Cory *v.* Gertchen, 2 Madd. 40; Overton *v* Bannister, 3 Ha. 503; Stikeman *v.* Dawson, 1 Deg. & Sm. 90.

[5] Reynell *v.* Sprye, 1 D. M. & G. 684.

[6] Burton *v.* Blakemore, 2 Jur. 1062; Bellamy *v.* Sabine, 2 Ph. 425, 448; Blair *v.* Bromley, 5 Ha. 559; Curzon *v.* B lworthy, 11 Jur. 916; Jennings *v.* Broughton, 17 Beav. 239; Wilde *v.* Gibson, 1 H. L. 605; Robson *v.* Earl of Devon, 4 Jur. N. S. 248; Lomax *v.* Ripley, 24 L. J. Ch. 254; Smith *v.* Kay, 7 H. L. 750.

[7] Mowatt *v.* Blake, 31 L. T. 387

which it is proved to the satisfaction of the court.[1] If a case of actual fraud is alleged by the bill, relief cannot be had on the bill by proving only a case of constructive fraud.[2] *

If the bill alleges a case of fraud, and the title to relief rests upon that fraud only, the bill will be dismissed if the fraud as alleged is not proved. It cannot be allowed to be used for any secondary purpose. But if the case does not entirely rest upon the proof of fraud, but rests also upon other matters, which are sufficient to give the court jurisdiction, and the case of fraud is not proved, but the other matters are proved, relief will be given in respect of so much of the bill as is proved.[3]

The rules of evidence are the same in equity as at law.[4] Whether certain facts as proved amount to a fraud, is a question for the court as well at law as in equity.† The facts to constitute a fraud must be proved at law by the jury.[5] In equity they are found by the court; but a court of equity is not justified in finding such facts upon any less or different

[1] Luff *v.* Lord, 11 Jur. N. S. 50, 52, *per* Lord Westbury.

[2] Parr *v.* Jewell, 1 K. & J. 671.

[3] Glascott *v.* Lang, 2 Ph. 310; Wilde *v.* Gibson, 1 H. L. 607; Archbold *v.* Commissioners of Charitable Bequests, 2 H. L. 440; Price *v.* Berrington, 3 Mac. & G. 486; Parr *v.* Jewell, 1 K. & J. 671; Billage *v.* Southee, 9 Ha. 535; Espey *v.* Lake, 10 Ha. 260; Baker *v.* Bradley, 7 D. M. & G. 597; Traill *v.* Baring, 33 L. J. Ch. 521; Hickson *v.* Lombard, L. R. 1 App. Ca. 324.

[4] Manning *v.* Lechmere, 1 Atk. 453; Man *v.* Ward, 2 Atk. 229; Glyn *v.* Bank of England, 2 Ves. 41

[5] Murray *v.* Mann, 2 Exch. 539.

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* Eyre *v.* Potter, 15 How. 42; Gibson *v.* Randolph, 2 Munf. 310; Gerde *v.* Hawkins, 2 Dev. Eq. 393; Blaisdell *v.* Cowell, 2 Shep. 370.

Allegations without proof, or proof without allegations, can never be the foundation of a decree. Brock *v.* McNaughtrey, 5 Mon. 216.

An allegation of fraud is not sustained by proof of a mistake of law. Gerde *v.* Hawkins, 2 Dev. Eq. 393.

Evidence of intoxication can not be introduced under a bill charging misrepresentation. Hutchinson *v.* Brown, 1 Clarke, 408.

† Pettibone *v.* Stevens, 15 Ct. 19; Beers *v.* Botsford, 13 Ct. 146.

Fraud is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances of a case. Brogden *v.* Walker, 2 H. & J. 285.

kind of proof than would be required to satisfy a jury. The law in no case presumes fraud. The presumption is always in favor of innocence, and not of guilt. In no doubtful matter does the court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established.[1]* Circumstances of mere suspicion will not warrant the conclusion of fraud.[2]† If the case made out is consistent with fair dealing and honesty, a charge of fraud fails.[3]

It is not, however, necessary, in order to establish fraud, that direct affirmative or positive proof of fraud be given.[4] In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be expected or required. Like much of human knowledge on all subjects, fraud may be inferred from facts that are established. Care must be taken not to draw the conclusion hastily from premises that will not warrant it; but if the facts established afford a sufficient and reasonable ground for drawing the inference of fraud, the conclusion to which the proof tends must, in the absence

[1] Bowen *v.* Evans, 2 H. L. 257; Pike *v.* Vigers, 2 Dr. & Wal. 267.

[2] Trenchard *v.* Wanley, 2 P. Wms. 166; Bath and Montagu's Case, 3 Ch. Ca. 114; Townsend *v.* Lowfield, 1 Ves. 35, 3 Atk. 536; M'Queen *v.* Farquhar, 11 Ves. 467; Walker *v.* Symonds, 3 Sw. 61; Hamilton *v.* Kirwan, 2 J. & L. 401; Smith *v.* Pawson, 25 L. T. 40.

[3] Hamilton *v.* Kirwan, 2 J. & L. 401; Pares *v.* Pares, 33 L. J. Ch. 218.

[4] Llewellin *v.* Mackworth, 2 Atk 40; Villiers *v.* Villiers, *ib.* 71; Man *v.* Ward, *ib.* 229; East India Co. *v.* Donald, 9 Ves. 282; Stikeman *v.* Dawson, 1 Deg. & Sm. 105; Pickles *v.* Pickles, 9 W. R. 397; 31 L. J. Ch. 146.

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* Teackle *v.* Bailey, 2 Brock, 43; Sanborne *v.* Stetson, 2 Story, 481, Christmas *v.* Spink, 15 Ohio, 600; Buck *v.* Sherman, 2 Doug. 176; Casey *v.* Allen, 1 A. K. Marsh. 465; Hamilton *v.* Beal, 2 H. & J. 414; Petrie *v.* Wright, 6 Smed. & Mar. 642.

When the fraud relates to title, the nature of incumbrances and outstanding titles must be shown, so that the court may judge of their validity. Ayres *v.* Mitchell, 3 Smed. & Mar. 683; Moss *v.* Davidson, 1 Smed. & Mar. 112; Wilson *v.* Leaffoor, 1 J. J. Marsh. 6.

† Clark *v.* White, 12 Pet. 178; Phettiplace *v.* Sayles, 4 Mason, 312;

of explanation or contradiction, be adopted.[1] * It is enough if facts be established from which it would be impossible, upon a fair and reasonable conclusion, to conclude but that there must have been fraud.[2] The motives with which an act is done may be, and often are, ascertained and determined by circumstances connected with the transaction, and the parties to it. Various facts and circumstances evince, sometimes with unerring certainty, the hidden purposes of the mind.[3] "A deduction of fraud," says Kent,[4] "may be made not only from deceptive assertions and false representations, but from facts, incidents, and circumstances, which may be trivial in themselves; but may, in a given case, be often decisive of a fraudulent design." [5]

Though the proof of fraud rests on the party who alleges it, circumstances may exist to shift the burthen of proof from the party impeaching a transaction on the party upholding it. If the evidence establishes a *primâ facie* case of fraud, or shows that an instrument is false in any material part, the

[1] Rex *v.* Burdett, 4 B. & Ald. 161, 162; Stikeman *v.* Dawson, 1 Deg. & Sm. 105; Humphrey *v.* Olver, 28 L. J. Ch. 406.

[2] Pickles *v.* Pickles, 9 W. R. 397; 31 L. J. Ch. 146; *Re* Marsden's Trust, 4 Drew. 599.

[3] Nichols *v.* Pinner, 4 Smith (Amer.), 295; Hennequin *v.* Naylor, 10 Smith (Amer.), 141.

[4] 2 Comm. p. 484.

[5] See Clarkson *v.* Hanway, 2 P. Wm. 205; Bennett *v.* Vade, 9 Mod. 315; Hubbard *v.* Briggs, 4 Tiff. (Amer.), 538.

Taylor *v.* Fleet, 4 Barb. 95; White *v.* Trotter, 4 Smed. & Mar. 30; Gregg *v.* Sayres, 8 Pet. 244.

This means no more than that the proof must be such as to create belief, and not merely suspicion. A rational belief should not be discarded because it is not conclusively established. Watkins *v.* Wallace, 19 Mich. 57.

* Reed *v.* Noxon, 48 Ill. 323; M'Conike *v.* Sawyer, 12 N. H. 396; Pope *v.* Andrews, 1 Smed. & Mar. 135; Denton *v.* McKenzie, 1 Dessau. 289.

Influence is not susceptible of direct proof. Conant *v.* Jackson, 16 Vt. 335.

burthen of showing that the transaction was fair lies upon the party who seeks to uphold it.[1] If, for example, it appear that the donee of a power of appointment had at any time, before the exercise of the power, the intention to derive a personal benefit from its exercise, the burthen rests on those who support the appointment to show that the intention had been abandoned at the time of the execution of the appointment.[2] So, also, if a man fraudulently mingles moneys belonging to another with moneys of his own, it lies on him to sever the portion which is affected by the fraud, from that which is not affected by the fraud.[3]* Upon the same principle, if it appear that a fiduciary or confidential relation exist between the parties to a transaction,[4] or if it be established by evidence that one of the parties possessed a power of influence over the other,[5] the burthen of proof lies upon the party filling the position of active confidence, or possessing the power of influence, as the case may be, to establish, beyond all reasonable doubt, the perfect fairness and honesty of the transaction. Parol evidence is admissible in such cases to prove the fairness of the transaction; but it is to be received and weighed with the most scrupulous accuracy, and to be dealt with as having its weight affected by the circumstances under which the parties stood.[6]

When a party is under the obligation of showing that an

[1] Watt *v.* Grove, 2 Sch. & Lef. 502; Prince of Wales Assurance Co. *v.* Palmer, 25 Beav. 605; Russell *v.* Jackson, 10 Ha. 213; Cottam *v.* Eastern Counties Railway Co., 1 J. & H. 243; Dowle *v.* Saunders, 2 H. & M. 250.

[2] Humphrey *v.* Olver, 28 L. J. Ch. 406.

[3] Russell *v.* Jackson, 10 Ha. 213.

[4] Gibson *v.* Jeyes, 6 Ves. 278; Benson *v.* Heathorn, 1 Y. & C. C. C. 340; Allfrey *v.* Allfrey, 1 Mac. & G. 99; Billage *v.* Southee, 9 Ha. 540; Moore *v.* Prance, *ib.* 303; *supra*, pp. 104, 116.

[5] Cooke *v.* Lamotte, 15 Beav. 240; Kay *v.* Smith, 7 H. L. 750; *supra*, pp. 132, 138.

[6] *Re* Holmes's Estate, 3 Giff 347; Walker *v.* Smith, 20 Beav. 394.

* Steers *v.* Hoagland, 50 Ill. 277; Well *v.* Silverston, 6 Bush 698; Brackenridge *v.* Holland, 2 Blackf. 377.

unprofessional person understood the contents of a deed or instrument which he executed, the mere proof of its having been read over to him, unaccompanied with proper explanations, is not sufficient to satisfy the court that the person hearing it read understood it.[1] It must be proved by those who claim under it, upon satisfactory evidence, that the nature, effect, and contents of the deed were explained to, and perfectly understood by him.[2] *

The intervention of an independent third party or adviser is an important ingredient in showing the fairness of a transaction.[3] If a solicitor be employed, there is always strong *primâ facie* evidence that the party for whom he was acting knew the nature of the transaction;[4] in all cases, indeed, where an independent legal adviser or solicitor is employed, the evidence that everything which was necessary to be known had been brought to the knowledge of his employer would be conclusive.[5] The intervention, however, of another solicitor or adviser, who, with the knowledge of the other party to the transaction, a former solicitor of his employer, neglects, or does not properly discharge his duty, is not sufficient to support a transaction between them.[6]

[1] Hoghton *v.* Hoghton, 15 Beav. 311; Moore *v.* Prance, 9 Ha. 304. See Sharp *v.* Leach, 31 Beav. 503; Toker *v.* Toker, *ib.* 629; 32 L. J. Ch. 325.

[2] Moore *v.* Prance, 9 Ha. 304; Anderson *v.* Ellsworth, 3 Giff. 154; Davies *v.* Davies, 4 Giff. 417; Cartledge *v.* Radbourne, 14 W. R. 604.

[3] Cooke *v.* Lamotte, 15 Beav. 240.

[4] Denton *v.* Donner, 23 Beav. 291.

[5] De Montmorency *v.* Devereux, 7 Cl. & Fin. 188.

[6] Gibbs *v.* Daniel, 4 Giff. 1.

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* Owing's Case, 1 Bland, 370; Selden *v.* Myers, 20 How. 506.

A court of equity will not commonly act upon the ignorance of a deed by a person who can read and write; but requires evidence of a contrivance in the opposite party to have the instrument drawn wrong, and keep the maker in the dark. Michael *v.* Michael, 4 Ired. Eq. 349.

When a grantor undertakes to read a deed, he must read it correctly; and if he does not, it is a fraud. That the grantee is capable of reading it himself makes no difference. Stamps *v.* Bracy, 1 How. (Miss.) 312.

The presumption that a person who can read knows the contents of

A party is not estopped from avoiding his deed, by proving that it was executed for a fraudulent, illegal, or immoral purpose.[1] Notwithstanding the solemnity and force which the law ascribes to deeds, and all the strictness with which it, in general, prohibits the introduction of extrinsic evidence to prove that an instrument goes beyond, or does not fully contain, or incorrectly exhibits, the terms of the contract, which it was written and signed for the purpose of expressing and recording; the rule is settled, and not merely in courts of equity, that a deed, on its face just and righteous, may be vitiated and avoided, by alleging and adducing extrinsic evidence to prove that it was founded on a consideration, or had a view or purpose contrary to law or public policy.[2] Although a party may thus, in certain cases, be enabled to take advantage of his own wrong,[3] this evil is of a trifling nature in comparison with the flagrant evasions that would, in many cases, result from the adoption of a different rule.[4]

If a person be induced by fraudulent statements to enter into a written contract, it is competent for him to prove fraud by evidence *aliunde*, although the written contract, or the deed of conveyance, is silent on the subject to which the fraudulent representation refers.[5] * So, also, fraud, whether

[1] Collins *v.* Blantern, 2 Wils. 341; 1 Smith's L. C. 325; Paxton *v.* Popham, 9 East, 421; Gas Light and Coke Co. *v.* Turner, 5 Bing. N. C. 666; 6 Bing. N. C. 324; Stratford and Moreton Railway Co. *v.* Stratton, 2 B. & Ad. 518; Hill *v.* Manchester Waterworks Co., *ib.* 552, 553; Doe *v.* Howells, *ib.* 747; Benyon *v.* Nettlefold, 17 Sim. 56; 3 Mac. & G. 94; Horton *v.* Westminster Improvement Commissioners, 7 Exch. 780.

[2] Reynell *v.* Sprye, 1 D. M. & G. 672, *per* Knight Bruce, L. J.

[3] Doe *v.* Ford, 3 A. & E. 654; Doe *v.* Howells, 2 B. & Ad. 747.

[4] Benyon *v.* Nettlefold, 3 Mac. & G. 102. See Mallalieu *v.* Hodgson, 16 Q. B. 689; Bowes *v.* Foster, 2 H. & N. 779.

[5] Dobell *v.* Stevens, 3 B. & C. 623; Wright *v.* Crookes, 1 Sc. N. R. 685, 698; Hotson *v.* Browne, 9 C. B. N. S. 442.

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the instrument which he executes, only stands until proof to the contrary is produced. Harris *v.* Delamar, 3 Ired. Eq. 213.

* Boyce *v.* Grundy, 3 Pet. 210; Brainerd *v.* Brainerd, 15 Ct. 575; Holbrook *v.* Burt, 22 Pick. 346; Flagler *v.* Preiss, 3 Rawle, 345; Kennedy *v.* Kennedy, 2 Ala. 571; Wilson *v.* Watts, 9 Md. 356.

in a record or deed, or writing under seal, may be proved by parol evidence.[1] So, also, if it appear from the written evidence, that the agreement really made between the parties is not stated by the deed, parol evidence is admissible to explain it.[2]

The testimony of one single witness, unless supported by circumstances, cannot be allowed to prevail against a positive denial by the answer. If a defendant positively, plainly, and precisely denies the assertion, and one witness only proves it as positively, clearly, and precisely as it is denied, and there is no circumstance attaching to the assertion to overbalance the credit due to the denial, as a positive denial, a court of equity will not act upon the testimony of that witness. Where, accordingly, a man positively denies notice, and one witness is adduced to prove the fact of notice, the court will place as much reliance on the conscience of the defendant, as on the testimony of a single witness, without some circumstance attaching a superior degree of credit to the latter.[3] *

[1] Filmer *v.* Gott, 4 Bro. P. C. 230; Robinson *v.* Lord Vernon. 7 C. B. N. S. 231; Rogers *v.* Hadley, 2 H. & C. 227.
[2] Cripps *v.* Jee, 4 Bro. C. C. 472.
[3] Evans *v.* Bicknell, 6 Ves. 183, *per* Lord Eldon; Pember *v.* Mathers, 1 Bro. C. C. 52; Lord Cranstown *v.* Johnson, 3 Ves. 170; East India Co. *v.* M'Donald, 9 Ves. 275; Pilling *v.* Armitage, 12 Ves. 80. See Whitworth *v.* Gaugain, Cr. & Ph. 325.

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* Garrow *v.* Davis, 15 How. 272; Flagg *v.* Mann, 2 Sumner, 486; Thompson *v.* Sanders, 6 J. J. Marsh, 94; Green *v.* Tanner, 8 Met. 411; Miller *v.* Tolleson, 1 Harp. Ch. 143.

One witness and corroborating circumstances amounting to a violent presumption are sufficient to overcome the denial. McCormick *v.* Malin, 5 Blackf. 509; Denton *v.* M'Kenzie, 1 Dessau, 289.

To have this effect, the answer must be direct, positive, and unequivocal. Farnam *v.* Brooks, 9 Pick. 212.

A denial according to the best of the defendant's recollection and belief is not sufficient. Town *v.* Needham, 3 Paige, 546.

If the facts admitted by the answer establish fraud, they must be held to outweigh the denial. Cunningham *v.* Freeborn, 3 Paige, 557; Dick *v.*

COSTS.

The general rule with respect to costs, being that costs follow the event, and that, *primâ facie*, he who succeeds ought to have them;[1] if a transaction is set aside,[2] or a bill for the specific performance of a contract is dismissed,[3] on the ground of misrepresentation, concealment, undue influence, or any other species of fraud, the successful litigant is, as a general rule, entitled to the costs. So, also, if a bill be filed for the rescission of a transaction, on the ground of fraud, and the charge of fraud fails, the dismissal is, in general, with costs.[4] So, also, when the specific performance of a contract is resisted on the ground of fraud, and the charge of fraud fails, the decree is, in general, with costs.[5] So, also, when a purchaser obtains specific performance, with compensation, it will be, in general, with costs.[6]

[1] Townsend *v.* Champernowne, 3 Y. & C. 527; Parr *v.* Lovegrove, 4 Jur. N. S. 600.

[2] Edwards *v.* M'Cleay, 2 Sw. 289; Bellamy *v.* Sabine, 2 Ph. 425; Dent *v.* Bennett, 4 M. & C. 269; Gibson *v.* D'Este, 2 Y. & C. C. 581; Mulhallen *v.* Marum, 3 Dr. & War. 317; Waters *v.* Thorn, 22 Beav. 561; Slim *v.* Croucher, 1 D. F. & J. 520; Dally *v.* Wonham, 33 Beav. 162; Baker *v.* Monk, *ib.* 425; Davies *v.* Davies, 4 Giff. 417.

[3] Vancouver *v.* Bliss, 11 Ves. 463; Lord Brooke *v.* Roundthwaite, 5 Ha. 306; Myers *v.* Watson, 1 Sim. N. S. 529; Cox *v.* Coventon, 31 Beav. 388.

[4] Langley *v.* Fisher, 9 Beav. 91; Loader *v.* Clark, 2 Mac. & G. 387; Pulsford *v.* Richards, 17 Beav. 87; Jennings *v.* Broughton, *ib.* 239; Dolman *v.* Nokes, 22 Beav. 402; New Brunswick, &c. Railway Co. *v.* Conybeare, 9 H. L. 735; Luff *v.* Lord, 11 Jur. N. S. 50; Straker *v.* Ewing, 34 Beav. 147.

[5] Abbott *v.* Sworder, 4 Deg. & G. 460; Haywood *v.* Cope, 25 Beav. 140; Clarke *v.* Mackintosh, 4 Giff. 134.

[6] Leyland *v.* Illingworth, 2 D. F. & J. 248; Gedge *v.* Duke of Montrose, 26 Beav. 45.

Grissom, 1 Freeman, 428; Gardiner Bank *v.* Wheaton, 8 Greenl. 373; Grannis *v.* Smith, 3 Humph. 179; Gazzam *v.* Poyntz, 4 Ala. 374.

Much reliance should not be placed upon loose conversations or confessions of the party to overbalance his solemn denial in his answer. Flagg *v.* Mann, 2 Sumner, 486.

When an executor or administrator, answering in his representative character, alleges facts of which he can have no personal knowledge, his answer will be allowed its due weight only, and is not entitled to the full influence of the answer of a man speaking of the facts which may be within his own knowledge. Clark *v.* Van Riemdyke, 9 Cranch, 153; Dugan *v.* Gittings, 3 Gill, 139.

Though the general rule is that, *primâ facie*, he who succeeds ought to have the costs, costs in equity do not always follow the event.[1] There may be often circumstances of an equitable nature to exempt the unsuccessful party from the payment of costs.[2] * When, for instance, a bill for the rescission of a transaction on the ground of misrepresentation was dismissed, the dismissal was without costs, the court being satisfied, although the charges as to misrepresentation had failed, that the property had not been correctly described.[3] So, also, where a bill for the rescission of a transaction, on the ground of undue influence, or of advantage taken of a fiduciary position, was dismissed on the ground of acquiescence, or delay in instituting the suit, or even on the merits, the dismissal was without costs, the court being satisfied that the plaintiff had a reasonable cause of suit, or that the conduct of the defendant had rendered an investigation not unreasonable.[4] So, also, if there has been negligence on the part of the plaintiff, he will not have his costs, although he succeed in the suit.[5] So, also, although a bill is dismissed, it will be without costs if there has been negligence.[6] So, also, in a case where relief was given against a transaction on the ground of undue influence, costs were not given to the plaintiff, as her conduct

[1] Staines *v.* Morris, 1 V. & B. 16.

[2] Vancouver *v.* Bliss, 11 Ves. 463; Townsend *v.* Champernowne, 3 Y. & C. 527; Grove *v.* Bastard, 1 D. M. & G. 78; Lyon *v.* Home, 16 W. R. 824.

[3] Bartlett *v.* Salmon, 6 D. M. & G. 40; Hallows *v.* Fernie, L. R. 3 Eq. 520.

[4] Montesquieu *v.* Sandys, 18 Ves. 301; Champion *v.* Rigby, 9 L. J. Ch. N. S. 211; Fyler *v.* Fyler, 3 Beav. 550; Edwards *v.* Meyrick, 2 Ha. 75; De Montmorency *v.* Devereux, 7 Cl. & Fin. 188; Salmon *v.* Cutts, 4 Deg. & Sm. 125; Baker *v.* Read, 18 Beav. 398; Hartopp *v.* Hartopp, 21 Beav. 274; Wright *v.* Vanderplank, 2 K. & J. 18; Clegg *v.* Edmondson, 8 D. M. & G. 806; Clanricarde *v.* Henning, 30 Beav. 175; Toker *v.* Toker, 31 Beav. 629, 32 L. J Ch. 326.

[5] Allen *v.* Knight, 5 Ha. 280.

[6] Evans *v.* Bicknell, 6 Ves. 173.

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* M'Donald *v.* Neilson, 2 Cow. 139; Bradley *v.* Chase, 22 Me. 511; White *v.* Meday, 2 Edw. Ch. 486; Pearce *v.* Chastain, 3 Kelly, 226; Sutphen *v.* Fowler, 9 Paige, 280; Reinick *v.* Smith, 2 H. & J. 471; Spencer *v.* Spencer, 11 Paige, 299.

was not free from blame.[1] So, also, although a transaction is set aside, the rescission may be without costs, if the defendant is free from moral blame.[2] So, also, where the plaintiff is *particeps criminis*, and seeks to set aside a security on the ground of public policy, the decree will be without costs.[3] So, also, although specific performance be decreed, the decree will be without costs, if the party resisting performance had a fair and reasonable ground for doing so.[4] In Higgins *v.* Samels,[5] where a bill for the specific performance of a contract was dismissed, on the ground of misrepresentation, the dismissal was, under the circumstances of the case, without costs. The court always exercises its discretion in dismissing a bill for specific performance, and with costs, on the ground of circumstances which would not be sufficient to cancel the agreement on the ground of fraud.[6] If, on the other hand, the defendant has been to blame in the matter, or has by conduct contributed to the litigation, the dismissal of a bill for specific performance will be without costs.[7]

As a general rule, where costs have been occasioned by the conduct of either party, the party who occasioned the costs must bear them; and where by the misconduct of both parties, neither has his costs: and where a suit has been rendered necessary by the misconduct of either party, still a part of the costs may have been rendered necessary by the other party.[8] If, accordingly, a man succeeds in obtaining the relief prayed

[1] Lyon *v.* Home, 16 W. R. 824.

[2] Ward *v.* Hartpole, 3 Bligh, 490; Wood *v.* Abrey, 3 Madd. 423; Groves *v.* Perkins, 6 Sim. 576; Baker *v.* Carter, 1 Y. & C. 250; Stanton *v.* Tattersall, 1 Sm. & G. 536; Prideaux *v.* Lonsdale, 1 D. J. & S. 439. In particular cases, the plaintiff may have to pay the costs, although the transaction is set aside, if the defendant be free from moral blame. Davies *v.* Otty, 35 Beav. 208.

[3] Debenham *v.* Ox, 1 Ves. 276; Morgan *v.* Bruen, Ll. & G. temp. Sug. 180; but see Jackman *v.* Mitchell, 13 Ves. 581. Comp. Davies *v.* Otty, 35 Beav. 208.

[4] Burrowes *v.* Lock, 10 Ves. 470; Vancouver *v.* Bliss, 11 Ves. 463; Fenton *v.* Browne, 14 Ves. 150. See M'Queen *v.* Farquhar, 11 Ves. 482.

[5] 2 J. & H. 460.

[6] Davis *v.* Symonds, 1 Cox, 402.

[7] Walters *v.* Morgan, 3 D. F. & J. 718.

[8] Parr *v.* Lovegrove, 4 Jur. N. S. 601, *per* Kindersley, V. C.

for, and has the costs of the suit generally, but fails to establish allegations of fraud in the bill, he must pay the costs occasioned by such allegations being introduced,[1] or, for the sake of simplicity, no costs will be given to either side when, but for the allegations of fraud, the plaintiff would have been entitled to the costs.[2] In Rhodes *v.* Bete,[3] the defendant was not ordered to pay costs, though the transaction was set aside, inasmuch as the case of the plaintiff failed to a considerable extent, and inasmuch as in so far as it succeeded, it was by force of the law of the court, and not by any merits of his own, the evidence adduced by him being also irrelevant and overcharged. In Staniland *v.* Willot,[4] where charges of fraud in the bill were neither supported nor repelled by evidence on either side, the costs were not thereby affected, as it did not appear that any costs were specially occasioned by such charges. In Fyler *v.* Fyler,[5] however, a bill containing unproven charges of fraud was dismissed without costs, because the defendants, by mixing up their personal interests in the transactions in question, had rendered an investigation not unreasonable. In like manner, charges of fraud made by defendants will, if unsubstantiated, be visited with costs, even though the defendant gets the costs of the suit generally.[6] So, also, the bill will be dismissed without costs, if the conduct of the defendant has not met with the approval of the court.[7]

Where plaintiff succeeds in a suit on the ground of fraud, he will be entitled to all the costs occasioned by it, and, therefore, in Stanley *v.* Bond,[8] a bill for the delivery of securities

[1] Blest *v.* Browne, 8 Jur. N. S. 602; Jones *v.* Ricketts, 10 W. R. 576. See Harvey *v.* Mount, 8 Beav. 439; Shackleton *v.* Sutcliffe, 1 Deg. & Sm. 623; Bromley *v.* Smith, 26 Beav. 670; St. Albyn *v.* Harding, 27 Beav. 11; Baker *v.* Bradley, 7 D. M. & G. 620.

[2] Cullingworth *v.* Lloyd, 2 Beav. 385; Rawlins *v.* Wickham, 1 Giff. 355.

[3] L. R. 1 Ch. App. 262.

[4] 3 Mac. & G. 664.

[5] 3 Beav. 550.

[6] Wright *v.* Howard, 1 Sim. & St. 205; Warrin *v.* Thomas, 2 W. R. 442; Pledge *v.* Buss, John. 666; Theyer *v.* Tombs, 12 W. R. 512.

[7] Leather Cloth Co. *v.* American Leather Cloth Co., 33 L. J. Ch. 199.

[8] 6 Beav. 423.

fraudulently obtained, being taken *pro confesso*, the plaintiff was held entitled to the costs of an action at law, commenced on the securities, though not specifically prayed for by the bill.

If a bill containing allegations of fraud be demurrable, and the defendant do not demur, his not having demurred will be a reason for refusing him his extra costs at the hearing.[1]

If acts are charged against a party, which are in themselves fraudulent, the court, upon the question of costs, always considers the bill as imputing fraud, although the word fraud be not used in the bill.[2]

Although a suit cannot be maintained, the court may dismiss it before the hearing, even without costs, if the defendant has been guilty of gross fraud.[3]

A solicitor, or legal adviser, who has abetted or mixed himself up in that character, in a fraudulent transaction, may be made a party to the suit, for the mere purpose of having the costs paid by him.[4] He cannot excuse himself from the payment of costs, on the ground that he acted as his client's adviser.[5] In a case where a solicitor was free from all moral blame, and took no benefit from the transaction, the costs of a suit to set aside the transaction were, nevertheless, thrown on him, because he had not explained to his client the nature of the instrument.[6] Although costs may not be given against a solicitor who has mixed himself up in a fraudulent transaction, costs will not be given to him.[7] In Harvey *v.* Mount,[8] a solicitor who acted as such in a transaction which was impeachable on the ground of fraud, but was himself free from

[1] Nesbitt *v.* Berridge, 1 N. R. 345.
[2] Marshall *v.* Sladden, 7 Ha. 444.
[3] Elsey *v.* Adams, 2 D. J. & S. 147.
[4] Marshall *v.* Sladden, 7 Ha. 443. See Brent *v.* Brent, 10 L. J. Ch. 84.
[5] Bennett *v.* Vade, 2 Atk. 324; Harvey *v.* Mount, 8 Beav. 439.
[6] Moore *v.* Prance, 9 Ha. 303. See Beadles *v.* Burch, 10 Sim. 332; Berry *v.* Armitstead, 2 Keen, 227; Gilbert *v.* Lewis, 1 D. J. & S. 52, *supra*, p. 312.
[7] Roddy *v.* Williams, 3 J. & L. 23.
[8] 8 Beav. 439.

moral culpability, was ordered to pay his own costs, as he had not acted with proper prudence in the matter. So, also, in Fyler *v.* Fyler,[1] where a solicitor, by mixing up his personal interest in his client's transactions, rendered an investigation not unreasonable, the bill was dismissed against him without costs, though it contained unproven charges of fraud.

The costs of a suit to set aside a deed for fraud, will not be given against a solicitor, or party to the fraud, if they are not specifically prayed by the bill.[2] If they are not specifically prayed by the bill, a demurrer will lie.[3]

If a man be accessory to a fraud on creditors, as being the trustee of a voluntary settlement, he will not be allowed his costs on setting aside the deed, although he may have derived no benefit from it.[4]

In a case where the name of a man had, by the false representations of a third party, been inserted on the register of the shareholders of a company, it was held that the company, though innocent, must bear the costs of the application.[5]

The Consolidated Orders 38, r. 2, reg. 2, do not contemplate the cause of fraud, so that, although the value of the subject-matter of the suit at the time of filing the bill may be considerably less than £1,000, the costs will be allowed on the higher scale.[6]

[1] 3 Beav. 550.
[2] Beadles *v.* Burch, 10 Sim. 338; Roddy *v.* Williams, 3 J. & L. 16.
[3] Beadles *v.* Burch, 10 Sim. 338.
[4] Townsend *v.* Westacott, 4 Beav. 58; Turquand *v.* Knight, 14 Sim. 644.
[5] *Re* Patent File Co., 15 W. R. 754.
[6] Earl of Stamford *v.* Dawson, 15 W. R. 896.

CHAPTER II.

MISTAKE.

Mistake is a ground for relief in equity. Mistake may be said to be some unintentional act, omission, or error arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence.[1] There is mistake if a man through ignorance be induced to do a thing which he would not have done, had he not been in error.[2]

Mistake may be either in matter of law or in matter of fact.[3]

The rule that mistake in matter of law cannot be admitted as a valid excuse either for doing an act prohibited by the law, or for the omission of a duty which it imposes, is common to all systems of law. *Regula est juris ignorantiam cuique nocere*, is the language of the Pandects.[4] *Ignorantia juris non excusat*, is the maxim of the common law. "It is to be presumed," says Manwood, as reported by Plowden,[5] "that no subject of this realm is miscognizant of the law whereby he is governed. Ignorance of the law excuseth none."[6] The rule is not only expedient, but is absolutely necessary. If ignorance of law were admitted as a ground of exemption, the court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable, for in almost every case ignorance of law would be alleged, and the court would, for the

[1] Story's Eq. Jur. 110.
[2] Jeremy's Eq. Jur. Bk. 2, pt. 2, p. 358.
[3] Dig. Lib. 22, tit. 6.
[4] Dig. Lib. 22, tit. 6, leg. 9.
[5] 1 Plowd. 342.
[6] See Manser's Case, 2 Co. Rep. 3 *a*, *b*; Cook *v.* Wotton, 4 Leon. 190; Stevens *v.* Lynch, 12 East, 38; Teede *v.* Johnson, 11 Exch. 840; Pooley *v.* Brown, 11 C. B. N. S. 566.

purpose of determining the point, be often compelled to enter upon questions of fact, insoluble and interminable.[1]

The rule is the same in equity. Mistake in matter of law cannot in general be admitted as a ground of relief in equity.[2]*

[1] Austin's Jur., vol. II, p. 172.

[2] Malden *v.* Menill, 2 Atk. 8; Marshall *v.* Collett, 1 Y. & C. 232; Denys *v.* Shuckburgh, 4 Y. & C. 42; Mellers *v.* Duke of Devonshire, 16 Beav. 257; Teed *v.* Johnson, 25 L. J. Exch. 110; Midland Great Western Co. of Ireland *v.* Johnson, 6 H. L. 798.

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* Bank of United States *v.* Daniel, 12 Pet. 32; Hunt *v.* Rousmanier, 2 Mason, 342; s. c. 1 Pet. 1; s. c. 8 Wheat. 174; McMurray *v.* St. Louis &c. Co., 33 Mo. 377; Peters *v.* Florence, 38 Penn. 194; Gwynn *v.* Hamilton, 29 Ala. 233; Smith *v.* McDougal, 2 Cal. 586; State *v.* Reigart, 1 Gill. 1; Dill *v.* Shahan, 25 Ala. 694; Mellich *v.* Robertson, 25 Vt. 603; Shafer *v.* Davis, 13 Ill. 395; Lyon *v.* Sanders, 23 Miss. 530; Gilbert *v.* Gilbert, 9 Barb. 532; McAninch *v.* Laughlin, 13 Penn. 371; Cooper *v.* Crosby, 3 Gilman, 506; Hinchman *v.* Emans, Saxton. 100; Drake *v.* Collins, 5 How. (Miss.) 253; Trigg *v.* Read, 5 Humph. 529; Storrs *v.* Barker, 6 Johns. Ch. 166; Bryant *v.* Mansfield, 22 Me. 360; Lyon *v.* Richmond, 2 Johns. Ch. 60; Brown *v.* Armistead, 6 Rand. 594; Gunter *v.* Thomas, 1 Ired. Eq. 195; Fergerson *v.* Fergerson, 1 Geo. Decis. 135; Shotwell *v.* Murray, 1 Johns. Ch. 512; Wintermute *v.* Snyder, 2 Green's Ch. 489; Good *v.* Herr, 7 W. & S. 253; Bell *v.* Steel, 2 Humph. 148; Pettes' Bank *v.* Whitehall, 17 Vt. 435; Heilbron *v.* Bissell, 1 Bailey's Ch. 430; Proctor *v.* Thrall, 22 Vt. 262; Dow *v.* Ker, Spears' Ch. 413.

Where parties upon deliberation and advice reject one species of instruments, and agree to select another under a misapprehension of law as to the nature of the instrument selected, a court of equity will not on the ground of such misapprehension, and the insufficiency of such instrument, direct a new instrument of a different character to be given. Hunt *v.* Rousmanier, 1 Pet. 1; s. c. 8 Wheat. 174; Broadwell *v.* Broadwell, 1 Gilman, 599; Leavitt *v.* Palmer, 3 Comst. 19; Arthur *v.* Arthur, 10 Barb. 9; Durant *v.* Durant, 2 Beasley, 201.

The fact that a decision upon which the parties relied has been subsequently overruled, is no ground for relief. Kenzon *v.* Weltz, 20 Cal. 637.

A mistake as to the legal effect of a statute is no ground for relief. State *v.* Paup, 13 Ark. 129.

A mistake in regard to the existence of a clause in the charter of a corporation reserving the right of appeal, is ground for relief. King *v.* Doolittle, 1 Head. 77.

When a party, through his attorney's mistake of the law, has bound

The maxim, *juris ignorantia non excusat*, is not, however, universally applicable in equity.[1] If the word *jus* is used in the sense of denoting general law, the ordinary law of the country, no exception can be admitted to the general application of the maxim; but it is otherwise when the word *jus* is used in the sense of denoting a private right.[2] If a man through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired.[3]

[1] Naylor *v.* Winch, 1 Sim. & St. 555; Watson *v.* Marston, 4 D. M. & G. 230, 236; Stone *v.* Godfrey, 5 D. M. & G. 76, 90.

[2] Cooper *v.* Phibbs, L. R. 2 App. Ca. 170, *per* Lord Westbury.

[3] See Cann *v.* Cann, 1 P. Wms. 727; Pusey *v.* Desbouverie, 3 P. Wms. 320; Cocking *v.* Pratt, 1 Ves. 400; Farewell *v.* Coker, cit. 2 Mer. 353; Naylor *v* Winch, 1 Sim. & St. 555; Macarthy *v.* Decaix, 2 R. & M. 614; Clifton *v.* Cockburn, 3 M. & K. 99; Sturge *v.* Sturge, 12 Beav. 229; Davis *v.* Morier, 2 Coll. 308; Reynell *v.* Sprye, 8 Ha. 222, 255; Cox *v.* Bruton, 5 W. R. 544; Stone *v.* Godfrey, 18 Jur. 162; Cooper *v.* Phibbs, 17 Ir. Ch. 82; D'Aguesseau, vol. IX, p. 629; Toullier's Cod. Civ. Liv. III, tit. 3, c. 2, § 62; Larombière, Théorie des Oblig., vol. I, pp. 43, 57. The misapprehension of rights under a deed, not arising from the misconstruction of the deed, is, it has been said, a mistake in fact; and is consequently relievable in equity. Denys *v.* Shuckburgh, 4 Y. & C. 42.

According to the Roman law there were certain classes of persons "*quibus permissum est jus ignorare.*" Dig. Lib. 22, tit. 6, leg. 9. They were exempt from liability (at least for certain purposes), not by reason of their general imbecility, but because it was presumed that their capacity is not adequate to a knowledge of the law. Such were women, soldiers, and persons who had not reached the age of twenty-five. Ignorance of law, considered *per se*, was in these cases considered a ground of exemption. In such cases it was presumed from the sex, or from the age, or from the profession of the party, that the party was ignorant of the law, and that the ignorance was inevitable. Austin's Jur., vol. II, p. 174. The persons "*quibus permissum est jus ignorare*," could not, however, allege with effect their ignorance of the law in case they violated those parts of it which were founded on the *jus gentium*. For the persons in question are not generally imbecile, and the *jus gentium* was knowable *naturali ratione*. With regard

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himself farther than he was legally liable, he may in a proper case obtain relief. Fitzgerald *v.* Peck, 4 Litt. 125; *contra*, Magniac *v.* Thomson, 2 Wall. Jr. 209.

A party having constructive though not actual notice of judgments over which he has priority by virtue of a mortgage, and taking an as-

Mistake in law, to be a ground for relief in equity, must be of a material nature, and the determining ground of the transaction.[1]

Mistake of law may be a misapprehension of the law, or of their private rights to property by both parties to a transaction, both of them making substantially the same mistake; or it may be a misapprehension of the law or of his private right by one of the parties alone.

If an agreement be entered into between two parties in mutual mistake as to their relative and respective rights, either of these is entitled to have it set aside.[2] Where, for instance, a party entered into an agreement with another to take a lease of what in fact was his own property, both parties being under a common mistake as to their respective rights, the transaction was set aside.[3] So also where a man had sold

to the *jus civile*, or to those parts of the Roman law which were peculiar to the system, they might allege with effect their ignorance of the law. Austin's Jur., vol. II, p. 175; see Lindl. on Jur., p. 24.

[1] Stone *v.* Godfrey, 5 D. M. & G. 76, *infra*, p. 340.

[2] Cooper *v.* Phibbs, L. R. 2 App. Ca, 149.

[3] *Ib.*

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signment of the equity of redemption, and thereby merging the mortgage, acts under a mistake as to his legal rights, and can not have relief. Campbell *v.* Carter, 14 Ill. 286.

The presumption that every man knows the law, may be rebutted by proof, and relief granted against a mistake of the law. Evarts *v.* Strodo, 11 Ohio, 480.

Where the legal principle is confessedly doubtful and one about which ignorance may well be supposed to exist, a person, acting under a misapprehension of the law, will not forfeit any of his legal rights by reason of such mistake. Lammott *v.* Bowly, 6 G. & J. 500; Cumberland Coal Co. *v.* Sherman, 20 Md. 117; Champlin *v.* Laytin, 10 Wend. 407; s. c. 1 Edw. Ch. 467; s c. 6 Paige, 189; Garner *v.* Garner, 1 Dessau. 437; Lowndes *v.* Chisolm, 2 McCord's Ch. 435; Mortimer *v.* Pritchard, 1 Bailey's Ch. 505; Freeman *v.* Curtis, 51 Me. 140; Jordan *v.* Stevens, 51 Me. 78; Moreland *v.* Atchinson, 19 Tex. 303; Green *v.* Morris &c. R. R. Co., 1 Beasley, 165; Hudon *v.* Ware, 15 Ala. 149; Cooke *v.* Nathan, 16 Barb. 342; Reservoir Co. *v.* Chase, 14 Ct. 123.

another an estate which in truth belonged to him, equity will order the purchase-moneys to be refunded.[1] So also where the second of three brothers having died, the eldest, who had entered upon his deceased brother's share, agreed to divide it with his youngest brother, upon the representation of a third party whom the two brothers had consulted, that, as land could not ascend, the youngest brother was heir to the second, and executed a conveyance accordingly, Lord King relieved the eldest brother against the instrument.[2]

If the mistake of law, or as to his private right be that of one party only to a transaction, it may be either that the mistake was induced or encouraged by the misrepresentation of the other party, or that, though not so induced or encouraged, it was known to and perceived by him, and was taken advantage of, or it may be that he was not aware of mistake. Whatever may be circumstances of the case, a court of equity may, under the peculiar circumstances of the case, grant relief.* But if it appear that the mistake was induced or encouraged by the misrepresentation of the other party to the transaction,[3]

[1] Bingham *v.* Bingham, 1 Ves. 126.
[2] Lansdowne *v.* Lansdowne, Mose. 364; cit. 2 J. & W. 205.
[3] Scholfield *v.* Templer, John. 166; Cooper *v.* Phibbs, L. R 2; App. Ca. 149, *supra*, pp. 12, 48.

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* Skillman *v.* Teeple, Saxton. 232; Bigelow *v.* Barr, 4 Ohio, 358; Williams *v.* Champion, 6 Ohio, 169; Sparks *v.* White, 7 Humph. 86; Lawrence *v.* Beaubien, 2 Bailey, 623.

When a contract is made in ignorance of the existence of any right or title in the party, it may be set aside. So also if it is made with the knowledge of the existence of some right, but in ignorance of any material fact affecting the matter or value of the right or title, essential to the character of the contract and an efficient cause in its concoction. Trigg *v.* Read, 5 Humph. 529.

The case in which an interference would be proper where a party has entered into an agreement under a mistake in regard to the construction of an instrument upon which his rights depended, must show a very plain clear mistake. Wintermute *v.* Snyder, 2 Green's Ch. 489; Dupre *v.* Thompson, 4 Barb. 279; Clayton *v.* Burney, 30 Geo. 946; Burt *v.* Wilson, 28 Cal. 632.

or was perceived by him and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake.[1] In Broughton *v.* Hutt,[2] where the heir-at-law of a shareholder in a company, the shares in which were personal estate, supposing himself, through ignorance of law, to be liable in respect of the shares, had executed a deed taking the liability on himself, it was held that he was entitled to have the deed cancelled. So also where a man having a legal security gave it up in exchange for another security, upon the faith that the right which he gave up would be secured to him by the substituted security, but the substituted security proved to be a mere nullity in law, relief was given.[3] So also where a woman renewed a note, believing that she was liable on the original note, relief was given.[4] So also where a sister, being ignorant of her rights under a settlement, released her rights to a brother, the release was held not binding on her.[5] So also where the daughter of a freeman of London accepted of a legacy left her by her father, and released her orphanage part according to the custom of London, and it did not appear, though she was told she might elect between the legacy and the orphanage part, that she knew she had a right to inquire into the value of the personal estate and the quantum of the orphanage part before making her election, the release was set aside.[6]

The same considerations should, it would seem, apply to the case of the payment of money under a mistake of law;[7] but it appears from the authorities to be established in equity as well as at law, that money paid under a mistake of law, with

[1] Cocking *v.* Pratt, 1 Ves. 400; M'Carty *v.* Decaix, 2 R. & M. 614; Sturge *v.* Sturge, 12 Beav. 229; Broughton *v.* Hutt, 3 D. & J. 501; see Worsley *v.* Frank, 11 L. T. 392.

[2] 3 D. & J. 501.

[3] *Re* Saxon Life Assurance Co., 2 J. & H. 408; 1 D. J. & S. 29. See Gee *v.* Spencer, 1 Vern. 32; Mildmay *v* Hungerford, 2 Vern. 243.

[4] Coward *v.* Hughes, 1 K. & J. 443.

[5] Ramsden *v.* Hylton, 2 Ves. 304.

[6] Pusey *v.* Desbouverie, 3 P. W. 315.

[7] See Clifton *v.* Cockburn, 3 M. & K. 99; Davis *v.* Morier, 2 Coll. 308; Cooper *v.* Phibbs, 17 Ir. Ch. 82.

full knowledge of the facts, is not recoverable, and that even a promise to pay, upon a supposed liability, and in ignorance of the law, will bind the party.[1]* But the rule is liable to a qualification, if the man to whom money has been paid has been accessory to the error of the other party, or has got some one to misinform him of the law.[2] If the law mistaken is the law of a foreign state, the mistake is regarded as a mistake of fact.[3]

In Davis *v.* Morier,[4] where a person had by mistake received for some years a less income than he was entitled to under a marriage settlement, it was held that he was under the circumstances of the case entitled to have the difference paid to him out of the estate of the deceased settler.

[1] Bilbie *v.* Lumley, 2 East, 469; Stevens *v.* Lynch, 12 East, 38; Brisbane *v.* Dacres, 5 Taunt. 143; Goodman *v.* Sayers, 2 J. & W. 263; Currie *v.* Goold, 2 Madd. 163; Drewry *v.* Barnes, 3 Russ. 94; Webb *v.* Brookes, 1 L. J. Ch. N. S. 191; Great Western Railway Co. *v.* Cripps, 5 Ha. 91; Platt *v.* Bromage, 24 L. J. Exch. 63; Bate *v.* Hooper, 5 D. M. & G. 338; Stafford *v.* Stafford, 1 D. & J. 197; Saitmarshe *v.* Barrett, 31 L. J. Ch. 783. See Moore *v.* Moore, 1 Coll. 54. Where money had been paid for many years without deducting the land-tax, no deduction was afterwards allowed out of the subsequent payments. Nicholls *v.* Lesson, 3 Atk. 573. So, also, where an executor had paid interest for seventeen years without deducting the property-tax, it was held he could not afterwards deduct out of the future interests due the amount of property-tax on such precedent payments. Currie *v.* Goold, 2 Madd. 163.

[2] Dixons *v.* Monkland Canal, 5 Wills. & Sh. Sc. Ap. 445.

[3] Haven *v.* Foster, 9 Pick. (Amer.) 112. See Leslie *v.* Baillie, 2 Y. & C. C. C. 91.

[4] 2 Coll. 303.

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* Elliott *v.* Swartout, 10 Pet. 137; Bank of United States *v.* Daniel, 12 Pet. 32; Haven *v.* Foster, 9 Pick. 112; Wheaton *v.* Wheaton, 9 Ct. 96; Pinkham *v.* Gear, 3 N. H. 163; Hubbard *v.* Martin, 8 Yerg. 498; Ege *v.* Koontz, 3 Barr, 109; Jones *v.* Watkins, 1 Stew. 81; Lyon *v.* Tallmadge, 14 Johns. 526; Clark *v.* Dutcher, 9 Cow. 674.

When money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back whether such mistake be one of law or of fact. Northrop *v.* Graves, 19 Ct. 548.

Payment by an administrator under a mistake of law to a person not entitled, does not relieve him from liability, although the party really entitled knew of the payment and made no objection. Davis *v.* Bayley, 40 Geo. 181.

Whether money paid under mistake of law can be reclaimed is a subject which has led to much difference of opinion among civilians and the commentators on the Roman law. The old school of lawyers were of opinion that money paid under mistake of law might be recovered back. But Cujas maintained an opposite opinion, and he was followed by Pothier and others; Vinnius, however, Huber and D'Aguesseau supported the doctrine of the earlier school.[1] The framers of the Code Napoleon adopted their opinion, and declared, in general terms, that money paid under mistake may be recovered back, making no distinction, in this respect, between mistake of law and mistake of fact.[2] The earlier authorities on the Scottish law are in favor of the doctrine that money paid under mistake of law may be recovered back.[3] In two cases, however,[4] Lord Brougham laid it down that at Scotch law money paid under mistake of law is not recoverable. But there is much reason to doubt whether the rule so laid down by him can be accepted as a sound exposition of the Scotch law. His judgment was founded solely on two English common-law authorities.[5]

Mistake in law is not a ground for setting aside a compromise, if the parties to the transaction were in difficulty and doubt, and wished to put an end to disputes, and to terminate or avoid litigation. If one or more parties, having, or supposing they have, claims upon a given subject matter, or claims against each other, agree to compromise these claims, and the knowledge, or means of knowledge, of each of them with respect to the mode in which, and the circumstances under which, his claim arises, stand upon an equal footing, and there is an absence of fraud or misrepresentation, the transaction is

[1] See Pothier, Obl. translated by Evans, App. vol. II, pp. 408–437.
[2] Cod. Civ. 1377.
[3] Mor. Dict. Dec. 2930, 2931.
[4] Wilson *v.* Sinclair, 4 Wills. & Sh. 398; Dixons *v.* Monkland Canal Co., 5 Wills. & Sh. 445.
[5] Bilbie *v.* Lumley, 2 East, 469; Brisbane *v.* Dacres, 5 Taunt. 143.

binding, although the conclusion at which the parties may have arrived is not that which a court of justice would have arrived at had its decision been sought. The real consideration which each party receives under a compromise being, not the sacrifice of the right, but the settlement of the dispute, and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only, and that the others had no right whatever. If, for instance, two parties claim adversely to each other the inheritance of a deceased person, and, in order to avoid litigation, agree to divide the inheritance, it is no ground for setting aside the agreement that only one was heir, and that the other gave up the right which he really possessed. The fact that the one may have had no claim is immaterial, if he was honestly mistaken as to his claim. It is enough if at the time of the compromise he may have believed he had a claim, and that the parties have, by the transaction, avoided the necessity of going to law.[1] * To render valid the compromise of a litigation, it is not even necessary that the question in dispute should really be doubtful, if the parties *bonâ fide* consider it to be so. It is enough to render a compromise valid, that there is a question to be decided between them.[2] A compromise of doubtful rights will not be set aside on any other ground than fraud.[3]

[1] Stapilton *v.* Stapilton, 1 Atk. 10; Gordon *v.* Gordon, 3 Sw. 463; Leonard *v.* Leonard, 2 Ba. & Be. 179; Naylor *v.* Winch, 1 Sim. & St. 555, 7 L. J. Ch. 6; Harvey *v.* Cooke, 4 Russ. 34; Attwood *v.* ——, 5 Russ. 149; Stewart *v.* Stewart, 6 Cl. & Fin. 969; Pickering *v.* Pickering, 2 Beav. 56, Reynell *v.* Sprye, 8 Ha. 222, 254; *Ex-parte* Lucy, 4 D. M. & G. 356; Lawton *v.* Campion, 18 Beav. 87; Partridge *v.* Stephens, 9 Jur. N. S. 742; Trigge *v.* Lavallée, 15 Moo. P. C. 270; Bullock *v.* Downes, 9 H. L. 1; 1; Brooke *v.* Lord Mostyn, 2 D. J. & S. 373; Lord Belhaven's Case, 3 D. J. & S. 41.

[2] *Ex-parte* Lucy, 4 D. M. & G. 356. See Neale *v.* Neale, 1 Keen, 672.

[3] Brooke *v.* Lord Mostyn, 2 D. J. & S. 373, *supra*, pp. 79, 80.

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* A compromise made under a mistake of law may be set aside if there is undue influence. Wheeler *v.* Smith, 9 How. 55.

A compromise made under a mutual mistake of fact may be set aside. Nabours *v.* Cocke, 24 Miss. 44.

The jurisdiction of equity over mistake is exercised much more liberally where the mistake is in matter of fact, than where it is in matter of law. The admission of ignorance of fact as a ground of relief, is not attended with those inconveniences which seem to be the reason for rejecting ignorance of law as a valid excuse. Whether the ignorance really existed, and whether it was imputable or not to the inadvertence of the party, is a question which may be solved by looking at the circumstance of the case. The inquiry is limited to a given incident, and to the circumstances attending that incident, and is, therefore, not interminable.[1] *

According to Savigny, ignorance has not, as such, any effect upon the legal consequences of an act or transaction in which it occurs. The effect generally attributed to ignorance is properly attributable to the negligence which is the cause of it. Ignorance which is not the effect of gross negligence is not prejudicial to the ignorant party, but ignorance which is the effect of such negligence is prejudicial to him. Whether ignorance be or be not the result of gross negligence, depends on

[1] Austin Jur. vol. II. p. 172.

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* Ketchum *v.* Catlin, 21 Vt. 191; Wheadon *v.* Olds, 2 Wend. 174; Merchants' Bank *v.* McIntyre, 2 Sandf. 431; Miles *v.* Stevens, 3 Barr. 21.

No person can be presumed to be acquainted with all matters of fact, nor is it possible by any degree of vigilance in all cases to acquire that knowledge; and for this reason a court of equity is liberal in granting relief to prevent injustice where the party asking it cannot be charged with culpable negligence. Jenks *v.* Fritz, 7 W. & S. 201.

A court of equity will relieve against a material mistake as to the quantity of land purporting to be conveyed by a deed. Wiley *v.* Fitzpatrick, 3 J. J. Marsh. 552; Crane *v.* Prather, 4 J. J. Marsh. 75.

When the contract is for a definite quantity, and the vendor makes a mistake as to the mode of measurement, there can be no relief by injunction against the greater use, although the vendee was under the same misapprehension. McKelway *v.* Cook, 3 Green's Ch. 103.

When a skillful person, in the performance of a mere ministerial duty, makes an error in the admeasurement of land, the mistake may be corrected. Jenks *v.* Fritz, 7 W. & S. 201; Whaley *v.* Elliott, 1 A. K. Marsh. 343; Gilmore *v.* Morgan, 2 J. J. Marsh. 65.

circumstances; it is presumed to be so when a man is ignorant of the general laws of his country, or of his own affairs, but it is not so presumed when he is ignorant of other matters. The presumption which arises in each of these cases is rebuttable, but is conclusive if not rebutted by the person against whom it arises. Ignorance of matters of law and ignorance of matters of fact, are thus placed on the same footing; both are prejudicial when the result of gross negligence; both are harmless when not so.[1]

Mistake of fact is a mistake not caused by the neglect of legal duty on the part of the person making the mistake,[2] and consisting in an unconsciousness,[3] ignorance,[4] or forgetfulness[5] of a fact past[6] or present,[7] material to the transaction; or in the belief in the present existence of a thing material to the transaction, which does not exist,[8] or in the past existence of a thing which has not existed.[9]

In "fraud," as distinguished from "mistake," there is, necessarily, a misapprehension or mistake in the party defrauded, which alone would not vitiate his dealings with others; but there is the additional circumstance that the party with whom he deals intentionally causes the mistake for the purpose of effecting the dealing, and this precludes the party so occasioning the mistake from holding the other bound to it.[10]

What is the nature or degree of mistake which is relievable in equity, as distinguished from mistake which is due to negli-

[1] Lindley on Jur. App. p. 19.
[2] New York Civil Code, Art. 762.
[3] See Kelly *v.* Solari, 9 M. & W. 54.
[4] See Cocking *v.* Pratt, 1 Ves. 400; East India Co. *v.* Neave, 5 Ves. 173; East India Co. *v.* Donald, 9 Ves. 275; Hore *v.* Becher, 12 Sim. 465; Bell *v.* Gardiner, 4 M. & G. 11.
[5] Kelly *v.* Solari, 9 M. & W. 54; Lucas *v.* Worswick, 1 Moo. & R. 293.
[6] See East India Co. *v.* Neave, 5 Ves. 173; East India Co. *v.* Donald, 9 Ves. 275; Willan *v.* Willan, 16 Ves. 72; M'Carthy *v.* Decaix, 2 R. & M. 614.
[7] See Cocking *v.* Pratt, 1 Ves. 400; Hore *v.* Becher, 12 Sim. 465; Colyer *v.* Clay, 7 Beav. 188; Broughton *v.* Hutt, 3 D. & J. 501.
[8] See Hitchcock *v.* Giddings, 4 Pri. 135; Colyer *v.* Clay, 7 Beav. 188; Hastie *v.* Couturier, 9 Exch. 102; 5 H. L. 673; Strickland *v.* Turner, 7 Exch. 208; Cochrane *v.* Willis, L. R. 1 Ch. App. 58.
[9] See New York Civil Code, Art. 762
[10] Leake on Contracts, 182.

gence,[1] and therefore not relievable, cannot well be defined so as to establish a general rule, and must, in a great measure, depend on the discretion of the court under all the circumstances of the case. Though a court of equity will relieve against mistake, it will not assist a man whose condition is attributable only to that want of due diligence which may be fairly expected from a reasonable person.[2] * Parties, for instance, who, having a good defence, or plain and complete remedy at law, have neglected to avail themselves of it there, cannot come to equity for relief.[3] Nor has a purchaser who is evicted by reason of a defect in title, which his legal adviser has overlooked, an equity to recover his purchase money.[4] Nor can relief be had against a forfeiture, where a man who is charged with a legal obligation neglects to perform it.[5] So also where a sum of money was paid by the purchaser of an estate to persons supposed to be entitled in remainder, to procure their concurrence in a recovery, which was suffered accordingly, Lord Nottingham refused to direct the money to be refunded.[6]

[1] *Supra*, pp. 93, 94. Facti ignorantia ita demum cuique non nocet, si non ei summa negligentia objiciatur. Quid enim si omnes in civitate sciant quod ille solus ignorat. Dig. Lib. 22, tit. 6, l. 9.

[2] Duke of Beaufort *v.* Neeld, 12 Cl. & Fin. 218, 286; Leuty *v.* Hillas, 2 D. & J. 110; Wild *v.* Hillas, 18 L. J. Ch. 170. See Trigge *v.* Lavallée, 15 Moo. P. C. 270.

[3] Stephenson *v.* Wilson, 2 Vern. 325; Blackhall *v.* Coombs, 2 P. W. 70; Holworthy *v.* Mortlock, 1 Cox, 141; Hankey *v.* Vernon, 2 Cox, 12; Stevens *v.* Praed, 2 Ves. Jr. 529; Bateman *v.* Willoe, 1 Sch. & Lef. 201; Hare *v.* Harwood, 14 Ves. 31; Drewry *v.* Barnes, 3 Russ. 94. See Marquis of Breadalbane *v.* Marquis of Chandos, 2 M. & C. 719; Henderson *v.* Cook, 4 Drew. 306.

[4] Urmston *v.* Pate, 3 Ves. 235, n. See Cator *v.* Lord Pembroke, 1 Bro. C. C. 301; 2 Bro. C. C. 282; Thomas *v.* Powell, 2 Cox, 394.

[5] Gregory *v.* Wilson, 9 Ha. 683, 689.

[6] Maynard *v.* Moseley, 3 Sw. 651.

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* Western R. R. Co. *v.* Babcock, 8 Met. 346; Ferson *v.* Sanger, 1 Wood & Min. 138; Wood *v.* Patterson, 4 Md. Ch. 335; Capehart *v.* Moon, 3 Jones' Eq. 178; Diman *v.* Providence &c. R. R. Co., 5 R. I. 130; Lamb *v.* Harris, 8 Geo. 546.

Where the means of inquiry are equally open to both parties, if a mistake occur without any fraud or falsehood, no relief can be granted on account of the mistake alone. Daniel *v.* Mitchell, 1 Story, 172; Warner

Mistake in matter of law or matter of fact, to be a ground for equitable relief, must be of a material nature, and must be the determining ground of the transaction. A man who seeks relief against mistake, must be able to satisfy the court that his conduct has been determined by the mistake. Mistake in matters which are only incidental to, and are not of the essence of a transaction, and without, or in the absence of which it is reasonable to infer that the transaction would nevertheless have taken place, goes for nothing.* If the mistake has not been the only cause by which the conduct of a man has been induced, but another motive has intervened, the mistake cannot be set up as a ground for relief.[1] Nor, indeed, does the circumstance that the mistake may be in a material matter always of itself entitle a man to the interposition of the court. The law does not go the length of requiring that parties who deal with each other at arms' length, should be on the same level as to information and knowledge. If parties stand upon an equal footing, and the means of information and knowledge are open to them both, either of them is entitled to the benefit of his own judgment, skill, and sagacity. If the parties act otherwise fairly in the transaction, and it is not a case in which one of them is bound, upon the ground of confidence, or other-

[1] Stone *v.* Godfrey, 5 D. M. & G. 76; Carpmael *v.* Powis, 10 Beav. 39; Trigge *v.* Lavallée, 15 Moo. P. C. 276. See Poth. Oblig. part 1, c. 1, s. 1, art. 3, s. 1; Domat. Liv. 1, tit. 18, sec. 1, art. 13–17; Toull. Cod. Civ. Liv. 3, c. 2, s. 2, art. 1–4.

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v. Daniels, 1 Wood & Min. 90; Hill *v.* Bush, 19 Ark. 522; Jouzin *v.* Toulmin, 9 Ala. 662.

A misunderstanding between a party and his attorney resulting in a failure to file a plea, is gross negligence, and not good ground for relief. Kite *v.* Lumpkin, 40 Geo. 506.

* M'Ferran *v.* Taylor, 3 Cranch, 268; Weaver *v.* Carter, 10 Leigh, 37; Segur *v.* Fingley, 11 Ct. 134; Trigg *v.* Read, 5 Humph. 529; Harrod *v.* Cowan, Hardin, 542.

A mutual mistake in regard to the title to property is a ground for rescinding a contract. Haddock *v.* Williams, 10 Vt. 570.

wise, to make a disclosure to the other of matters affecting the subject-matter in respect of which they are dealing, the court will not interfere. A man cannot have relief on the ground of mistake, unless the party benefited by the mistake is disentitled in equity and conscience from retaining the advantage which he has acquired.[1] *

Mistake of fact may be the mistake of one party only to a contract, or there may be a mistake of both parties respecting the same matter; and thus there arise two different conditions of the questions, which are governed by considerations of a different character.

The mistake of one party only is attended by different consequences, accordingly as the other party is or is not cognizant of the mistake.

The law judges of an agreement between two persons exclusively from those expressions of their intention, which are communicated between them; consequently, an agreement cannot be affected by the mistake of either party in expressing his intention, or in his motives, of which the other party has no knowledge; and the party who has entered into an agreement under such a mistake, is bound by the agreement actually made, and cannot assert his mistake in avoidance of the agreement at law,[2] or in equity.[3] †

[1] 1 Fonb. Eq. B. 1, c. 2, § 7; Story Eq. Jur. 147, 151; Warner *v.* Daniels, 1 Wood & Min. (Amer.) 90, *supra*, pp. 53, 54, 57.

[2] Leake on Contracts, 168.

[3] See Stapylton *v.* Scott, 13 Ves. 427; Alvanley *v.* Kinnaird, 2 Mac. & G. 7; Cox *v.* Bruton, 5 W. R. 544.

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* McCobb *v.* Richardson, 24 Me. 82; Crowder *v.* Langdon, 3 Ired. Eq. 476; Hunter *v.* Goudy, 1 Ohio, 449.

† Lies *v.* Stubb, 6 Watts, 48; Farley *v.* Bryant, 32 Me. 474; Coffing *v.* Taylor, 16 Ill. 457.

It is not enough to show the sense and intention of one of the parties to the contract. It must be shown incontrovertibly that the sense and intention of the other party concurred in it; in other words, it must be proved that they both understood the contract, as it is alleged it ought to

Upon this principle it is not competent, in the case of a written agreement, for either of the parties to avoid its effect by merely showing that he understood the terms in a different sense from that which they bear in their grammatical construction and legal effect.[1] In special cases, however, and under special circumstances, a court of equity may, as has been already stated, relieve a party who has, under a mistake of his private rights, been induced to part with his property.[2]

When a party is mistaken in his motives for entering into a contract, or in his expectations respecting it, such mistake does not affect the validity of the contract. If a man purchases a specific article, believing that it will answer a particular purpose to which he intends to put it, and it fails to do so, he is not the less on that account bound to pay for it.[3] In *Cumberlege* v. *Lawson*,[4] where a person executed a

[1] Leake on Contracts, 169.
[2] Meadows *v.* Meadows, 16 Beav. 404, *supra*, p. 333.
[3] Chanter *v.* Hopkins, 4 M. & W. 399; Ollivant *v.* Bayley, 5 Q. B. 288; Leake on Contracts, 169, *supra*, p. 63.
[4] 1 C. B. N. S. 709.

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have been, and in fact it was, but for the mistake. If it be clearly shown that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail unless it be further shown that the other party agreed to it in the same way, and that the intention of both of them was by mistake misrepresented by the contract. Lyman *v.* Utica Ins. Co., 17 Johns. 373; Nevius *v.* Dunlap, 33 N. Y. 676; Wemple *v.* Stewart, 22 Barb. 154; Ruffner *v.* McConnell, 17 Ill. 212; Gordere *v.* Downing, 18 Ill. 492.

When parties have a different understanding of the import of their contract, the appropriate relief is not to reform the contract but to set it aside. Bellows *v.* Steno, 14 N. H. 175.

A court of equity can not insert a stipulation which was intentionally omitted from the contract. Betts *v.* Gunn, 31 Ala. 219.

When the clause sought to be inserted is not one that has been omitted by mistake, but is merely one that ought, as a matter of propriety, to be inserted, no relief can be granted. Thompson Scale Manuf. Co. *v.* Osgood, 26 Ct. 16.

deed in the belief that another person would also execute it, but did not deliver it as an escrow, conditional upon such execution, and was not betrayed into executing it by any fraud or misrepresentation, he was held bound by the deed, although the person expected by him to execute it failed to do so.[1] So also when a person being desirous of becoming a freeholder in Essex, contracted to purchase a house on the north side of the river Thames, which he supposed to be in that county, but which proved to be in Kent, the contract was held binding, and he was compelled in equity to complete the purchase.[2]

A court of equity will, however, in many cases refuse to grant a plaintiff the peculiar remedy of specific performance of a contract, which the defendant has entered into under a mistake, although the plaintiff was not privy to the mistake, or implicated in its origin. A man who seeks to take advantage of the plain mistake of another, cannot come to a court of equity to assist him in doing so, but must rest satisfied with the remedies which a court of law will give him.[3]* A court of equity will not enforce specific performance of an agreement more favorable to the one party than the other, and involving hardship upon him, if there be reasonable grounds for doubting whether he entered into it with a knowledge of its nature and consequences.[4] The court will not compel a man specifically to perform a contract which he never intended to enter into, or which he would not have entered into, had its true

[1] Comp. Evans *v.* Bremridge, 2 K. & J. 174; 8 D. M. & G. 100.

[2] Shirley *v.* Davis, cited 6 Ves. 678, 7 Ves. 270; but *see* 1 Bro. C. C. 440.

[3] Manser *v.* Back, 6 Ha. 448; Wood *v* Scarth, 2 K. & J. 33. See Stapylton *v.* Scott, 13 Ves. 427.

[4] Vivers *v.* Tuck, 1 Moo. P. C. N. S. 516. See Manser *v.* Back, 6 Ha. 443, 447; Alvanley *v.* Kinnaird, 2 Mac. & G. 7; Watson *v.* Marston, 4 D. M. & G. 230; Falcke *v.* Gray, 4 Drew. 659; Shrewsbury and Birmingham Railway Co. *v.* North-Western Railway Co. 6 H. L. 113.

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* Coles *v.* Brown, 10 Paige, 526; Carberry *v.* Tannehill, 1 H. & J. 224.

effect been understood.[1]* If the description of the property, the subject-matter of the sale, or the terms of the contract are ambiguous, so that the one party may have reasonably made a mistake, as to the subject-matter or the terms of the contract, or may have reasonably put a different construction on the contract from that which was contemplated by the other, the court will not assist either of them in enforcing the contract against the other.[2] If the person who seeks the aid of the court is the author of the ambiguity, or has in any way misled the other, the rule applies with peculiar force.[3] But the author of the ambiguity may himself have the benefit of the rule.[4] Specific performance may be refused, even when there has not been any impropriety of conduct on the part of the party seeking specific performance, and the mistake is purely the mistake of the person against whom relief is sought, if, under the circumstances of the case, it appears inequitable that there should be specific performance.[5] A defendant, for instance, may resist specific performance of an agreement, by showing that he had made a mistake in stating the terms of the agreement in a letter.[6]

[1] Harnett *v.* Yeilding, 2 Sch. & Lef. 549; Watson *v.* Marston, 4 D. M. & G. 230; Wood *v.* Scarth, 2 K. & J. 33; Baxendale *v.* Seale, 19 Beav. 601; Webster *v.* Cecil, 30 Beav. 64; Hood *v.* Oglander, 34 Beav. 518.

[2] Calverly *v.* Williams, 1 Ves. Jr. 210; Jenkinson *v.* Pepys, cit. 15 Ves. 521, 1 V. & B. 528; Clowes *v.* Higginson, 1 V. & B. 524; Neap *v.* Abbott, C. P. C. 333; 1 Coop. C. C. temp. Cott. 382; Manser *v.* Back, 6 Ha. 447; Baxendale *v.* Seale, 19 Beav. 601; Swaisland *v.* Dearsley, 29 Beav. 430; Moxey *v.* Bigwood, 8 Jur. N. S. 803; Parker *v.* Taswell, 2 D. & J. 559. See Wycombe Railway Co. *v.* Donnington Hospital, L. R. 1 Ch. App. 268.

[3] Mason *v.* Armitage, 13 Ves. 373; Higginson *v.* Clowes, 1 V. & B. 524; Moxey *v.* Bigwood, 8 Jur. N. S. 803, 10 Jur. N. S. 597.

[4] Neap *v.* Abbott, C. P. C. 333; 1 Coop. C. C. temp. Cott. 382; Manser *v.* Back, 6 Ha. 443.

[5] Malins *v.* Freeman, 2 Keen, 25; Alvanley *v.* Kinnaird, 2 Mac. & G. 7; Webster *v.* Cecil, 30 Beav. 64. See Fairhead *v.* Southee, 9 Jur. N. S. 764.

[6] Wood *v.* Scarth, 2 K. & J. 33; Webster *v.* Cecil, 30 Beav. 64.

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* Ely *v.* Perrine, 1 Green's Ch. 396; Greer *v.* Boone, 5 B. Mon. 554; Trigg *v.* Read, 5 Humph. 529.

If the terms of the contract are not ambiguous, or there appears to have been no reasonable ground for the mistake, it is not sufficient, in order to resist specific performance, for the purchaser to swear that he has made a mistake, or did not understand what he was about.[1]

If the mistake cannot be established without evidence, equity will allow a defendant to a bill for specific performance to support a defence founded on this ground by evidence *dehors* the agreement.[2]

If the mistake be of one party alone to a contract, and it be known to the other at the time of making the contract, the fact that the latter knew of the mistake may have an important bearing on the validity of the contract.*

If the one party has, by misrepresentation, caused the mistake for the purpose of obtaining the contract, his conduct may amount to fraud.[3]

If he knew of the mistake of the other, but is not responsible for causing it, and in making the agreement merely remains silent, the question depends on the nature of the mistake and the general circumstances of the case.

If the mistake is in the expression of the agreement, one of the parties cannot in equity hold the other bound to an expression of intention which he knew to be not in accordance with his real intention.[4]† Where, for instance, a man supposes

[1] Swaisland *v.* Dearsley, 29 Beav. 430. See Nock *v.* Newman, 1 L. J. Ch. N. S. 175; Leuty *v.* Hillas, 2 D. & J. 110.

[2] Manser *v.* Back, 6 Ha. 448; Wood *v.* Scarth, 2 K. & J. 33.

[3] *Supra*, pp. 13, 15–26. See Worsley *v.* Frank, 11 L. T. 392; Shearman *v.* Macgregor, 11 Ha. 106.

[4] Garrard *v.* Frankel, 30 Beav. 445.

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* Cathcart *v.* Robinson, 5 Pet. 264; Read *v.* Cramer, 1 Green's Ch. 277; Botsford *v.* McLean, 45 Barb. 478.

† Greer *v.* Caldwell, 14 Geo. 207; Leitensdorfer *v.* Delphy, 15 Mo. 160; Wyche *v.* Green, 16 Geo. 49; Harding *v.* Randall, 15 Me. 332.

A court of equity will rescind a written contract, whether executed or executory, within or without the statute of frauds, a conveyance of realty

that he has entered into a contract for a lease at one rent, and it turns out that the rent specified in the agreement is of a different amount, the contract will be set aside, unless the party against whom relief is sought, shall agree to accept the rent which he knew it was the intention of the plaintiff to give.[1] So also where in a conveyance of messuages the plan on the deed comprised a piece of land not intended by the vendor to be included, a decree was made to vary the deed, an option being given to the purchaser to have his contract annulled.[2]

If the mistake is not in the expression of the agreement, but in some fact materially inducing it, the mere knowledge in the one party of a mistake in the other party, does not in the absence of a duty to disclose, or other special circumstances, constitute a sufficient ground in equity for avoiding the agreement.[3] If parties are at arm's length, either of them may remain silent, and avail himself of his superior knowledge as to facts and circumstances equally open to the observation

[1] *Ib.* See also Worsley *v.* Frank, 11 L. T. 392.

[2] Harris *v.* Pepperell, L. R. 5 Eq. 1.

[3] *Supra*, p. 57, 58.

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or of personalty, to let in an equity arising from facts perfectly distinct from the construction of the instrument itself; and whatever doubts may at one time have existed to the contrary, it is now established that relief may be had against a mistake in a written instrument; that such mistake may be shown by parol proof and relief granted to the injured party whether he sets up the mistake affirmatively by a bill, or as a defence or to rebut an equity. Wyche *v.* Green, 11 Geo. 159.

A court of equity will not interfere where the instrument is such as the parties themselves designed it to be, for if they voluntarily choose to express themselves in the language of the instrument, they are bound by it. McElderry *v.* Shipley, 2 Md. 25; Leavitt *v.* Palmer, 3 N. Y. 19; Stoddard v. Hart, 23 N. Y. 556; Garner *v.* Bird, 57 Barb. 277.

The choice must be such a voluntary choice as the law considers a sufficiently free exercise of the will to constitute an agreement, a valid instrument in the absence of fraud, and not a choice made under undue or fraudulent influence. Wilson *v.* Watts, 9 Md. 356.

of both, or equally within the reach of their ordinary diligence, and is under no obligation to draw the attention of the other to circumstances affecting the property, the subject-matter of the contract, although he may know him to be under a mistake with respect to them.[1] The case, however, is otherwise if there be a duty to disclose. A party who is under a duty to disclose, and who, there is reason to believe, knows more about the subject-matter of the agreement than the other party, will not be permitted by a court of equity to hold the latter to the agreement.[2] Relief may indeed be at times had in equity, even though no fiduciary relation appears to subsist between the parties, when, under the special circumstances of the case, it appears inequitable that the one party should hold the other to his engagement.[3] Relief, accordingly, was given, where an instrument had been delivered up under the ignorance of one party, and with the knowledge of the other as to a fact, upon which the rights attached.[4]

Money paid voluntarily, under mistake of fact, is recoverable both at law and in equity, unless it be clear that the party making the payment intended to waive all inquiry into the facts. It is not enough that he may have had the means of learning the truth if he had chosen to make inquiry. The only limitation is that he must not waive all inquiry.[5] *

By the general rule of the common law, if there be a con-

[1] *Supra*, p. 54.

[2] Cocking *v.* Pratt, 1 Ves. 400; Millar *v.* Craig, 6 Beav. 433; Meadows v. Meadows, 16 Beav. 404; Cox *v.* Bruton, 5 W. R. 544.

[3] East India Co. *v.* Donald, 9 Ves. 275.

[4] *Ib.*

[5] Kelly *v.* Solari, 9 M. & W. 54; Townsend *v.* Crowdy, 8 C. B. N. S. 477. See Gregory *v.* Pilkington, 8 D. M. & G. 616; Shand *v.* Grant, 15 C. B. N. S. 324.

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* Scott *v.* Warner, 2 Lans. 49; Boon *v.* Miller, 16 Mo. 457; Ashbrook *v.* Watkins, 3 Mon. 82.

The payment of a check retained beyond the time fixed by the rules of the clearing-house by mistake, is payment under a mistake of fact. Merchants' National Bank *v.* National Eagle Bank, 101 Mass. 281.

tract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time it was in a state of preparation, so as to add or subtract from, or in any manner to vary or qualify, the written contract.[1] A court of equity, however, admits such evidence, whether the purpose of the suit be to rectify or rescind an agreement.[2] * But the court will not act upon such evidence, unless the proof be clear and conclusive. In all cases where such evidence is given, great attention will be paid to what is stated by the other party to the instrument.[3]

The mistake may be common to both parties to a transaction, and may consist either in the expression of their agreement, or in some matter inducing or influencing the agreement, or in some matter to which the agreement is to be applied.[4] †

[1] Goss *v.* Lord Nugent, 5 B. & Ad. 58.

[2] Bentley *v.* Mackay, 31 L. J. Ch. 709; Garrard *v.* Frankel, 30 Beav. 451.

[3] Bentley *v.* Mackay, 31 L. J. Ch. 709, *infra*, p. 421.

[4] Leake on Contracts, p. 172.

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* Gillespie *v.* Moon, 2 Johns. Ch. 585; Washburn *v.* Merrills, 1 Day, 139; Graves *v.* Mattingly, 6 Bush. 361.

† Allen *v.* Hammond, 11 Pet. 632; s. c. 2 Sumner, 387; Thompson *v.* Jackson, 3 Rand. 504; Carr *v.* Callaghan, 3 Litt. 365; Glassell *v.* Thomas, 3 Leigh, 113; Chamberlaine *v.* Marsh, 6 Munf. 283.

Nothing is more clear in equity than the doctrine that a contract founded in a mutual mistake of the facts constituting the very basis or essence of it will avoid it. Daniel *v.* Mitchell, 1 Story, 173; Marvin *v.* Bennett, 8 Paige, 312; Leger *v.* Bonaffe, 2 Barb. 475; Irick *v.* Fulton, 3 Grat. 193; Miles *v.* Stevens, 3 Barr, 21.

Where the mistake is of so fundamental a character that the minds of the parties have never, in fact, met, or where an unconscionable advantage has been gained by mere mistake or misapprehensions, and there has been no gross negligence in falling into error, relief may be granted. Brown *v.* Lamphear, 35 Vt. 252; Allen *v.* Hammond, 11 Pet. 63; Williams *v.* Shafford, 8 Pick. 250; Connor *v.* Henderson, 15 Mass. 319; Winston *v.* Gwathmey, 8 B. Mon. 23; Greene *v.* Bateman, 2 Woodb. & M. 359.

A mutual mistake in regard to the title of the vendor is ground for

The rule at law is that an agreement cannot be varied by external evidence, and that the parties are bound by the document, which they have signed and accepted as their agreement,[1] unless there be error on the face of it so obvious as to leave no doubt of the intention of the parties, without the assistance of external evidence. If there be mistake or error on the face of an instrument, a court of law can correct it.[2] *

The strict rule at law is, however, largely tempered by the doctrine and practice of courts of equity, for a court of equity will not specifically enforce a contract which has been drawn up by mistake, in terms not in conformity with the real agreement of the parties, and will, in many cases, reform or set aside the mistaken agreement.

The defence that the contract sought to be enforced is not in conformity with the real agreement between the parties, but has been drawn up incorrectly by mistake, may be set up by parol evidence in answer to a bill for specific performance.[3] † If the defendant can show that the instrument does not represent the real agreement between the parties, the plaintiff cannot have specific performance, unless he consent to the vari-

[1] Hitchin *v.* Groom, 5 C. B. 515.
[2] Wilson *v.* Wilson, 5 H. L. 66; *per* Lord St. Leonards; Leake on Contracts, 173.
[3] Joynes *v.* Statham, 3 Atk. 388; Garrard *v.* Grinling, 2 Sw. 244; Lord Gordon *v.* Marquis of Hertford, 2 Madd. 106.

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relief. Smith *v.* Robertson, 23 Ala. 312; Hyne *v.* Campbell, 6 Mon. 286; Boulin *v.* Pollock, 7 Mon. 26.

If a judgment is confessed under a clear mistake, a court of law will set it aside if application be made, and the mistake shown while the judgment is in its power. An agreement to confess judgment is not stronger than the confession itself. If the judgment is no longer in the power of the court, relief may be obtained in chancery. These principles are of universal justice, and universal application. The Hiram, 1 Wheat. 440.

* Barr *v.* Broadway Ins. Co. 16 N. Y. 269; Cries *v.* Withers, 26 Md. 553.

† Cathcart *v.* Robinson, 5 Pet. 264; Bradbury *v.* White, 4 Greenl. 391; Voorhees *v.* De Meyer, 2 Barb. 37.

ation as set up by the defendant. If the plaintiff will not accept specific performance with the variation as set up and proved by the defendant, his bill will be dismissed;[1] and specific performance of the agreement, with the variation proved, may be decreed at the instance of the defendant without a cross bill.[2] Athough a defendant may show by parol that the written instrument does not represent the contract between the parties, a plaintiff cannot have a decree for specific performance of a written contract with a variation upon parol evidence, for the Statute of Frauds is a bar to the relief.[3]* Parol evidence is admissible on the part of the party resisting specific performance, not to vary the terms of the agreement, but to show that it is unconscientious in the plaintiff to seek specific performance, without submitting to the variation set up and proved by the other.[4]

If parties enter into an agreement, but there is an error in the reduction of the agreement into writing, so that the written instrument fails through some mistake of the draftsman, either in matter of law[5] † or of fact, to represent

[1] Joynes *v.* Statham, 3 Atk. 388; Clarke *v.* Grant, 14 Ves. 519; Ramsbottom *v.* Gosden, 1 V. & B. 165; London and Birmingham Railway Co. *v.* Winter, Cr. & Ph. 57; Martin *v.* Pycroft, 2 D. M. & G. 785; Fallon *v.* Robins, 16 Ir. Ch. 428.

[2] Fife *v.* Clayton, 13 Ves. 546.

[3] Woollam *v.* Hearn, 7 Ves. 211; Clinan *v.* Cooke, 1 Sch. & Lef. 22, 39; Squire *v.* Campbell, 1 M. & C. 459, 480, *per* Lord Cottenham; Att.-Gen. *v.* Sitwell, 1 Y. & C. 559; Davies *v.* Fitton, 2 Dr. & War. 225; Manser *v.* Back, 6 Ha. 443, 447; Wilson *v.* Wilson, 5 H. L. 65. *per* Lord St. Leonards.

[4] Clowes *v.* Higginson, 1 V. & B. 524.

[5] Wake *v.* Harrop, 1 H. & C. 202.

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* A court of equity may, in the same suit, at the instance of the plaintiff, rectify an instrument, and decree specific performance. Gillespie *v.* Moon, 2 Johns. Ch. 585, Kerssilbrack *v.* Livingston, 4 Johns. Ch. 144; Moale *v.* Buchanan, 11 G. & J. 314; Mosby *v.* Wall, 23 Miss. 81; Ballance *v.* Underhill, 3 Scam. 453; Huson *v.* Pitman, 2 Hayw. 331; Willis *v.* Henderson, 4 Scam. 13; Smith *v.* Allen, Saxton 43; Bellows *v.* Stone, 14 N. H. 175; *contra*, Osborne *v.* Phelps, 19 Ct. 62; Elder *v.* Elder, 10 Me. 80; Thomas *v.* McCormick, 9 Dana, 108.

† Beardsley *v.* Knight, 10 Vt. 185; Goodell *v.* Field, 15 Vt. 448; Washburn *v.* Merrill, 1 Day, 139; Alexander *v.* Newton, 2 Grat. 266; Parham

the real agreement of the parties, or omits or contains terms or stipulations contrary to the common intention of the parties, a court of equity will correct and reform the instrument, so as to make it conformable to the real intent of the parties.[1]* So also if a conveyance, executed for the purpose of giving effect to and executing an agreement, should by mistake give the purchaser less than the agreement entitled him to, he may call on the court to rectify the defective conveyance, and give him all that the agreement comprehended.[2]† The principle

[1] Beaumont *v.* Bramley, T. & R. 41; Cockerell *v.* Cholmeley, Taml. 435; Ashhurst *v.* Mill, 7 Ha. 502; Barrow *v.* Barrow, 18 Beav. 529; Murray *v.* Parker, 19 Beav. 308; Reade *v.* Armstrong, 7 Ir. Ch. 375; Malmesbury *v.* Malmesbury, 31 Beav. 407; Scholfield *v.* Lockwood, 32 Beav. 436; 33 L. J. Ch. 106; Druiff *v.* Parker, L. R. 5 Eq. 137.

[2] Monro *v.* Taylor, 3 Mac. & G. 718; Leuty *v.* Hillas, 2 D. & J. 120; 4 Jur. N. S. 1167. See Cox *v.* Bruton, 5 W. R. 544.

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v. Parham, 6 Humph 287; Rogers *v.* Atkinson, 1 Kelly, 12; Collier *v.* Lanier, 1 Kelly, 238; Larkins *v.* Biddle, 21 Ala. 252; Stedwell *v.* Anderson, 21 Ct. 139.

* Baynard *v.* Norris, 5 Gill, 468; Wooden *v.* Haviland, 18 Ct. 101; Savage *v.* Berry, 2 Scam. 545; Hunt *v.* Freeman, 1 Ohio, 226; Finley *v.* Lynn, 6 Cranch, 238; Scott *v.* Duncan, 1 Dev. Eq. 403; Aldridge *v.* Weems, 2 G. & J. 36; Manz *v.* Beckman Iron Co., 9 Paige, 188; Newcomer *v.* Kline, 11 G. & J. 457; Peterson *v.* Grover, 20 Me. 363; Chamberlain *v.* Thompson, 10 Ct. 243; Keyton *v.* Branford, 5 Leigh, 39; Desell *v.* Casey, 3 Dessau. 84; Bass *v.* Gilliland, 5 Ala. 761; Leonard *v.* Austin, 2 How. (Miss.) 888; Gelton *v.* Hawkins, 2 J. J. Marsh. 1; McMillin *v.* McMillin, 7 Mon. 560.

† Tilton *v.* Tilton, 9 N. H. 385; Riemer *v.* Cantillon, 4 Johns. Ch. 85; Blessing *v.* Beatty, 1 Rob. 287; Gardner *v.* Gardner, 1 Dessau. 137; Blodgett *v.* Hobart, 18 Vt. 414; McKay *v.* Simpson, 6 Ired. Eq. 452; Blair *v.* McDonnell, 1 Halst. Ch. 327.

A mistake may be corrected between the original parties, or those claiming under them in priority, as heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice. Simmons *v.* North, 3 Smed. & Mar. 67; Wall *v.* Arrington, 13 Geo. 88; Strang *v.* Beach, 11 Ohio St. R. 283.

A bill will not lie to correct a mistake, unless, on application, those having power to rectify it refuse to do so. Lamkin *v.* Reese, 7 Ala. 170; Beck *v.* Simmons, 7 Ala. 71.

The omission of a statutory requirement may be supplied. Beardsley *v.* Knight, 10 Vt. 185; Watson *v.* Wells, 5 Ct. 468.

upon which the court acts in correcting instruments, is, that the parties are to be placed in the same situation as they would have stood in if the error to be corrected had not been committed. When a deed as drawn up goes beyond the instructions and the intention of the parties, it will be rectified.[1] *

[1] Walker *v.* Armstrong 8 D. M. & G. 544.

When there is an omission of some statutory requirement in the deed of a *feme covert*, the mistake can not be corrected. Dickinson *v.* Glenney, 27 Ct. 104; Grapengether *v.* Fejervary, 9 Iowa, 163.

If an instrument is prepared according to the intentions of the parties, but read incorrectly, it will be valid. White *v.* Williams, 2 Green's Ch. 376.

A penal bond left in blank may be filled up. Gray *v.* Rumph, 2 Hill's Ch. 6.

The omission of a seal may be supplied. Montville *v.* Haughton, 7 Ct. 542; Rutland *v.* Paige, 24 Vt. 181.

The omission of words of inheritance may be corrected. Rutledge *v.* Smith, 1 Busbee's Eq. 283; Wright *v.* Delafield, 23 Barb. 498; Colchester *v.* Culver, 29 Vt. 111; Springs *v.* Harven, 3 Jones' Eq. 96; Cromwell *v.* Winchester, 2 Head. 389.

The word "dollars" may be inserted in a sealed note. Newcomer *v.* Kline, 11 G. & J. 457.

An instrument may be corrected against sureties, as well as against others. Butler *v.* Durham, 3 Ired. Eq. 589; Huson *v.* Pitman, 2 Hey. 331; Newcomer *v.* Kline, 11 G. & J. 457.

A deed may be corrected so as to bind the firm, instead of one partner. McNaughton *v.* Partridge, 11 Ohio, 223.

A mistake in an application for an insurance policy may be corrected, even after a loss has occurred. Harris *v.* Columbiana County Ins. Co., 18 Ohio, 116.

A mistake in an insurance policy may be rectified. Fireman's Ins. Co. *v.* Powell, 13 B. Mon. 311; National Fire Ins. Co. *v.* Crane, 16 Md. 260.

A *bona fide* purchaser may have a deed corrected as to the description, so as to discharge the land from a judgment lien that attached after the execution of the defective conveyance. Gouverneur *v.* Titus, 1 Edw. Ch. 477; Simmons *v.* North, 3 Smed. & Mar. 67; White *v.* Wilson, 6 Blackf. 448; Barr *v.* Hatch, 3 Ohio, 527.

An omission with knowledge, and reliance on a parol promise that the omitted portion shall be carried out, is not a mistake or ground for relief. Ligon *v.* Rogers, 12 Geo. 281.

A court of equity will not correct a mistake in a voluntary conveyance. Minturn *v.* Seymour, 4 Johns. Ch. 497.

* Tilton *v.* Tilton, 9 N. H. 385; Le Roy *v.* Platt, 4 Paige, 77; Watson

Relief upon a defective instrument is the more readily afforded when the party to be charged thereon is himself the person who prepared or perfected it.[1] The fact, however, that the defective instrument may have been drawn up by the party seeking relief is immaterial, if a proper case be made out.[2]

A person, however, who seeks to rectify an instrument, on the ground of mistake, must be able to prove not only that there has been a mistake, but must be able to show exactly and precisely the form to which the deed ought to be brought, in order that it may be set right according to what was really intended, and must be able to establish, in the clearest and most satisfactory manner, that the alleged intention of the parties to which he desires to make it conformable, continued concurrently in the minds of all parties down to the time of its execution. The evidence must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties.[3]* If, upon a personal agreement for a life assurance, a policy be drawn by the

[1] *Ex-parte* Wright, 19 Ves. 257; Collett *v.* Morrison, 9 Ha. 176.

[2] Ball *v.* Storie, 1 Sim. & St. 218.

[3] Lord Townshend *v.* Stangroom, 6 Ves. 334; Beaumont *v.* Bramley, T. & R. 41, 50; Marquis of Breadalbane *v.* Marquis of Chandos, 2 M. & C. 740: Rooke *v.* Lord Kensington, 2 K. & J. 764; Fowler *v.* Fowler, 4 D. & J. 265; Earl of Bradford *v.* Earl of Romney, 30 Beav. 431; Bentley *v.* Mackay, 31 L. J. Ch. 709; Sells *v.* Sells, 1 Dr. & Sm. 42. See Lloyd *v.* Cocker, 19 Beav. 144.

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v. Cox, 1 Ired. Eq. 389; Davis *v.* Phelps, 7 Mon. 632; Richardson *v.* Blight, 8 B. Mon. 580.

* United States *v.* Munroe, 5 Mason, 572; Lyman *v.* Little, 25 Vt. 576; Lyman *v.* United States Ins. Co., 17 Johns. 373; s. c. 2 Johns. Ch. 630; Triplett *v.* Bailey, 8 Humph. 230; Farly *v.* Bryant. 32 Me. 474; Reese *v.* Wyman, 9 Geo. 430; Mosby *v.* Wall, 23 Miss. 81; Beard *v.* Hubble, 9 Gill, 420; Brantley *v.* West, 27 Ala. 542.

If the mind of the court is satisfied, the requirement is complied with. Gillespie *v.* Moon, 2 Johns. Ch. 585; Sharman *v.* Miller, 6 Md. 479; Tucker *v.* Maddin, 44 Me. 206; Hillman *v.* Wright, 9 Ind. 126; Davidson *v.* Greer, 3 Sneed, 384; Ruffner *v.* McConnell, 17 Ill. 217.

insurance office in a form which differs from the terms of the agreement, and varies the rights of the parties assured, equity will interfere and deal with the case on the footing of the agreement, and not on that of the policy.[1] If it appear that there was a change of intention, by which the circumstance that the instrument does not follow the terms of the original contract might be explained, there can be no rectification;[2] so, also, if it appear that the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifiying the instrument.[3] There can be no rectification, if the mistake be not mutual or common to all parties to the instrument,[4] or if one of the parties knew of the mistake at the time he executed the deed. Rectification can only be had where both parties have executed an instrument under a common mistake, and have done what neither of them intended.[5] A mistake on one side may be a ground for rescinding, but not for correcting or rectifying an agreement.[6]

In Harris *v.* Pepperell,[7] Lord Romilly, M. R., said that the rule that the court will not rectify an instrument on the ground of mistake, except the mistake be mutual, is liable to an exception in a case between vendor and purchaser. But the distinction is not supported by the authorities, and does not seem sound. Garrard *v.* Franke[8] and Harris *v.* Pepperell,[9] were, there is no reason to doubt, correctly determined; but the principle upon which they are to be upheld is, that the court in these cases merely abstained from setting the agreement aside, on the consent of the defendant to submit to the

[1] Collett *v.* Morrison, 9 Ha. 162.
[2] Marquis of Breadalbane *v.* Marquis of Chandos, 2 M. & C. 740.
[3] Bentley *v.* Mackay, 31 L. J. Ch. 709.
[4] Rooke *v.* Lord Kensington, 2 K. & J. 753; Fowler *v.* Fowler, 4 D. & J. 265; Sells *v.* Sells, 1 Dr. & Sm. 42.
[5] Eaton *v.* Bennett, 34 Beav. 196; Fallon *v.* Robins, 16 Ir. Ch. 422.
[6] Mortimer *v.* Shortall, 2 Dr. & War. 372; Fowler *v.* Fowler, 4 D. & J. 265.
[7] L. R. 5 Eq. 1.
[8] 30 Beav. 451.
[9] L. R. 5 Eq. 1.

variation alleged by the plaintiff. In cases of rectification, properly so called, the court does not put it to the defendant to submit to the variation alleged by the plaintiff, but makes the instrument conformable to the intent of the parties without any such offer or submission.

Although, however, the court will not rectify a transaction between two or more parties, unless on the ground of mutual mistake, a deed poll by way of appointment may be rectified on the ground of mistake, if the mistake is clearly proved on the part of the person making it.[1]

Parol evidence is admissible on the application to rectify an instrument to show what the intention of the parties really was.[2] In most, if not in all, the cases in which the court has reformed an instrument, there has been something beyond the parol evidence, such, for instance, as a rough draft of the agreement, written instructions for preparing it, or the like; but the court will act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach.[3] If, however, there is not anything in writing beyond the parol evidence to go by, and the defendant, by his answer, denies the case set up by the plaintiff, the plaintiff will often be without a remedy, though, even in such cases, the parol evidence may be so conclusive as to justify the court in granting the relief prayed.[4]

If the original agreement is of doubtful construction, and the conveyance is definite and unequivocal, it is not easy to

[1] Wright *v.* Goff, 22 Beav. 214. See Wilkinson *v.* Nelson, 7 Jur. N. S. 481.

[2] Alexander *v.* Crosbie, Ll. & G. temp. Sug. 145; Mortimer *v.* Shortall, 2 Dr. & War. 363; Barrow *v.* Barrow, 18 Beav. 532; Lackersteen *v.* Lackersteen, 6 Jur. N. S. 1111.

[3] Alexander *v.* Crosbie, Ll. & G. 149; Mortimer *v.* Shortall, 2 Dr. & War. 373; Lackersteen *v.* Lackersteen, 6 Jur. N. S. 1111; Tomlison *v.* Leigh, 11 Jur. N. S. 962.

[4] *Ib.*; Beaumont *v.* Bramley, T. & R. 52; Fowler *v.* Fowler, 4 D. & J. 273; Bentley *v.* Mackay, 31 L. J. Ch. 709.

avoid the conclusion that the latter may be the best evidence of the terms of the actual agreement.[1]

Where a document has been signed as an agreement in a common mistake as to its contents, and it appears that no real agreement was come to between the parties, according to which it might be rectified, the court will set it aside.[2] There can be no rectification, if one of the contracting parties never heard of that which is said to be the real agreement.[3]

Where the instrument sought to be rectified on the ground of mistake was a marriage settlement, the doctrine in the older cases was, that where the articles and settlements were both before marriage, the court would not interfere, unless the settlement was expressed to be made in pursuance of the articles, for, without such a recital, the court supposed that the parties had altered their intentions as regarded the terms of the contract.[4] The later authorities, however, dispense with the necessity of a reference to previous articles in the settlement.[5] Where a settlement purports to be in pursuance of articles entered into before marriage, and there is any variance, then no evidence is necessary to have the settlement corrected; and although the settlement contains no reference to the articles, yet if it can be shown that the settlement was intended to be in conformity with the articles, and there is clear and satisfactory evidence showing that the discrepancy had arisen from a mistake, the court will reform the settlement, and make it conformable to the real intention of the parties.[6]

In some cases, where the fact of the mistake can be fairly implied from the nature of the transaction, relief will be given,

[1] Humphries *v.* Horne, 3 Ha. 277.
[2] Calverley *v.* Williams, 1 Ves. Jr. 210; Price *v.* Ley, 4 Giff. 235; aff. 11 W. R. 475; Fowler *v.* Scottish Equitable Life Assurance Society, 28 L. J. Ch. 228. See Cox *v.* Bruton, 5 W. R. 544.
[3] Fowler *v.* Scottish Equitable Life Assurance Society, 28 L. J. Ch. 228.
[4] Bold *v.* Hutchinson, 5 D. M. & G. 566.
[5] *Ib.*
[6] *Ib.* 568.

although the fact of the mistake is not established by direct evidence. Thus, in cases where there has been a joint loan of money to two or more obligors, and they are by the instrument made jointly liable, but not jointly and severally, the court has reformed the instrument and made the obligation joint and several, so as to charge the estate of a deceased obligor, upon the reasonable presumption, from the nature of the transaction, that it was so intended by the parties.[1] * The debt being joint, the natural, if not the irresistible, inference in such cases is, that it is intended by all the parties that, in every event, the responsibility should attach to each obligor, and to all equally. This can be done only by making the bond several as well as joint; for otherwise, in case of the death of one of the obligors, the survivor or survivors only would be liable at law for the debt.[2] Indeed, it is now well established, as a general principle, that every contract for a joint loan is, in equity, to be deemed, as to the parties borrowing, a joint and several contract, whether the transaction be of a mercantile nature or not; for, in every such case, it may fairly be presumed to be the intention of the parties that the creditor should have the several, as well as the joint, security of all the borrowers for the payment of the debt.[3] Hence, if one of the borrowers should die, the creditor has a right to proceed for immediate relief out of the assets of the deceased party, without claiming any relief against the surviving joint contractors, and without showing that the latter are unable to pay by reason of their insolvency.[4]

[1] Simpson *v.* Vaughan, 2 Atk. 31, 32; Bishop *v.* Church, 2 Ves. 100, 371; Thomas *v.* Frazer, 3 Ves. 399; Underhill *v.* Horwood, 10 Ves. 227; Devaynes *v.* Noble, Sleech's Case, 1 Mer. 564; Thorpe *v.* Jackson, 2 Y. & C. 553.

[2] Gray *v.* Chiswell, 9 Ves. 118; *Ex parte* Kendall, 17 Ves. 525.

[3] Thorpe *v.* Jackson, 2 Y. & C. 553.

[4] *Ib.*; Williamson *v.* Henderson, 1 M. & K. 582.

* Weaver *v.* Shryork, 6 S. & R. 262; Barnes *v.* Camart, 1 Barb. 394; Hyde *v.* Tanner, 1 Barb. 84.

But, where the inference of a joint original debt or liability is repelled, a court of equity will not interfere; for in such a case there is no ground to presume a mistake. The doctrine has been thus stated by Sir W. Grant, in Sumner *v.* Powell:[1] "Where the obligation exists only in virtue of a covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, although at law it is only the joint debt of all. But then all the partners have had a benefit from the money or the credit given; and the obligation of all to pay exists independently of any instrument by which the debt may have been secured. So, where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It is not the bond that first created the liability."

It is upon the same ground that a court of equity will not reform a joint bond against a mere surety, so as to make it several against him, upon the presumption of a mistake from the nature of the transaction; but it will require positive proof of an express agreement by him that it should be several, as well as joint.[2] So where an obligee of a joint and several bond elected to take a judgment against all the obligors, and thus at law lost his right of a several remedy, a court of equity refused him a remedy against the personal assets of a deceased obligor, who was only a surety.[3] So also in cases where the obligation or covenant is purely matter of arbitrary convention, not growing out of any antecedent liability in all or any of the obligors or covenantors to do what they have undertaken (as, for example, a bond or covenant of indemnity for the acts or debts of third persons), a

[1] 2 Mer. 36.
[2] *Ib.*; Rawstone *v.* Parr, 3 Russ. 539.
[3] United States *v.* Price, 9 How. (Amer.) 83.

court of equity will not by implication extend the responsibility from that of a joint to a joint and several undertaking.[1] * But if there be an express agreement to the effect that an obligation or other contract shall be joint and several, or to any other effect, and it is omitted by mistake in the instrument, a court of equity will, under such circumstances, grant relief as fully against a surety or guarantee, as against the principal party.[2] †

The equity for rectification on presumptive evidence is applied also to a mortgage by husband and wife of the wife's estate, which has limited the equity of redemption to the husband. If the instrument does not recite an intention to do more than make a mortgage, the presumption is that nothing more was intended; and the instrument will be reformed by restoring the equity of redemption to the wife. And, in like manner, it is held that if a lease be made by a tenant for life, under a power created by a settlement, and a rent reserved to the lessor and his heirs, these words shall be interpreted by the prior title, and applied to the remainderman under the settlement, and not the heir of the lessor.[3]

The principle upon which the court reforms and corrects an instrument on the ground of mistake, will not apply in a case in which a matter has been completely overlooked on both sides; and the agreement is a substantial agreement, which speaks in sufficiently clear terms for itself, and contains no reference to any other instrument, or to any pre-existing

[1] Sumner *v.* Powell, 2 Mer. 36, 37; Clarke *v.* Bickers, 14 Sim. 639.

[2] Crosby *v.* Middleton, Prec. Ch. 309; 2 Eq. Ca. Ab. 188; Sumner *v.* Powell, 2 Mer. 36; Rawstone *v.* Parr, 3 Russ. 539.

[3] Innes *v.* Jackson, 1 Bligh, 104, 114; Clark *v.* Burgh, 2 Coll. 221.

* Warb *v.* Webber, 1 Wash. 274; Harrison *v.* Mirge, 2 Wash. 136.

† Berg *v.* Radcliffe, 6 Johns. Ch. 302; Wiser *v.* Blackley, 1 Johns. Ch. 607.

relation;[1] or in a case where the instrument is in accordance with the expressed intention of the parties, and has been prepared with full knowledge of their rights, but has failed only because the parties have been ill-advised as to the way of giving effect to their intention.[2] * Nor will the court make a settlement conformable with what it is alleged it would have been if all the material points had been present to the minds of the parties at the time they executed it.[3] Nor will the court, under the name of rectification, add to the agreement a term which had not been determined upon, or was not agitated between them. There can be no rectification if the agreement executed is in accordance with the proposals.[4] Nor can there be rectification, if it was by the intention of the parties that the written instrument did not comprise all the terms of the actual agreement.[5]

Though the court will rectify an instrument which fails through some mistake of the draughtsman in point of law to carry out the real agreement between the parties,[6] it is not sufficient, in order to create an equity for rectification, that there has been a mistake as to the legal construction, or the legal consequences of an instrument. The proper question always is, not what the document was intended to mean, or how it was intended to operate, but what it was intended to be. For example, where an annuity had been sold by the plaintiff, and was intended to be redeemable, but it was agreed that a clause of redemption should not be inserted in

[1] Parker *v.* Taswell, 2 D. & J. 559.
[2] Farr *v.* Sheriffe, 4 Ha. 513.
[3] Barrow *v.* Barrow, 18 Beav. 534; Wilkinson *v.* Nelson, 7 Jur. N. S. 481. See Hills *v.* Rowland, 4 D. M. & G. 430.
[4] Elwes *v.* Elwes, 3 D. F. & J. 667.
[5] Lord Irnham *v.* Child, 1 Bro. C. C. 92; Lord Portmore *v.* Morris, 2 Bro. C. C. 219; Lord Townshend *v.* Stangroom, 6 Ves. 332; Harbidge *v.* Wogan, 5 Ha. 258.
[6] Wake *v.* Harrop, 1 H & C. 202.

* Hunt *v.* Rousmanier, 1 Pet. 1; Durant *v.* Bacot, 2 Beasley, 201.

the deed, because both parties erroneously supposed that its insertion would make the transaction usurious, it was held that the omission could not be supplied in equity, for the court was not asked to make the deed what the parties intended, but to make it that which they did not intend, but which they would have intended if they had been better informed.[1] So also where a party making a voluntary deed supposes that he will have a power of subsequent revocation, though no such power is reserved, the deed cannot afterwards be rectified by inserting the power, the evidence merely showing that the power had been omitted under the erroneous belief that it was not necessary to insert it, not that the power was intended to be inserted, but was left out by mistake.[2]

Nor can there be rectification, although both parties may have been under a mistake, if the mistake be in respect of a matter materially inducing the agreement.[3]

The court will not rectify a voluntary deed, unless all the parties consent. If any object, the deed must take its chance as it stands.[4] Nor can a voluntary deed be reformed, except with the consent of the settler, if it fails to carry out the intention of the parties. A voluntary deed may, however, be set aside after the death of both donor and donee, if there is evidence to show that the donee complained of the deed and took steps to annul it.[5]

The court will not reform a deed or instrument upon petition or motion, but only upon a regular bill for that purpose; and until a deed or instrument is reformed, the court is bound to act upon it as it exists.[6]

If parties enter into an agreement conditionally, and in

[1] Irnham *v.* Child, 1 Bro. C. C. 92; Townshend *v.* Stangroom, 6 Ves. 328.
[2] Worrall *v.* Jacob, 3 Mer. 270.
[3] Carpmael *v.* Powis, 10 Beav. 36.
[4] Brown *v.* Kennedy, 33 Beav. 133.
[5] Philipson *v.* Kerry, 32 Beav. 628. See Cox *v.* Bruton, 5 W. R. 544.
[6] *Re* Malet, 30 Beav. 407.

contemplation of or with reference to a supposed actual state of things, and it turns out that, by the mutual mistake of the parties, the supposed actual state of things does not in fact subsist, the consideration for the agreement fails, and the agreement is consequently void as well at law as in equity.[1] A contract, for instance, for the sale of a cargo, supposed by both parties to be on board a particular ship, is at end if the cargo had at the time ceased to exist.[2] So also a contract for the sale of an annuity, during the life of a person, is conditional upon his being alive at the time of the sale; so that he having previously died, and purchase-money having been paid in ignorance of the fact, the sale is void, and the purchaser is entitled to recover back his money.[3] So, also, where a policy of insurance was renewed during the days of grace allowed after the expiration of the policy and acceptance of the premiums, both parties being ignorant that the life insured had previously died during the days of grace, it was held that, the renewal being conditional upon the insured being then alive, it was void.[4] So also where an agreement was made for the sale of a remainder in fee expectant on an estate tail, and a bond was given to secure the purchase-moneys; but it appeared that at the time of the sale the tenant in tail had suffered a recovery and destroyed the remainder, of which both parties were ignorant, the agreement was held void, and the bond was cancelled, upon the ground that the parties had contracted upon the supposition that a recovery had not then been suffered.[5] So also where an agreement was made between the assignee of the tenant for life of an estate and the person entitled in remainder, respecting the

[1] See Stapylton *v.* Scott, 13 Ves. 427; Robinson *v.* Dickenson, 3 Russ. 413; Cooper *v.* Phibbs, L. R. 2 App. Ca. 149.

[2] Couturier *v.* Hastie, 9 Exch. 102, 5 H. L. 673.

[3] Strickland *v.* Turner, 7 Exch. 208.

[4] Pritchard *v.* Merchants' Life Insurance Society, 3 C. B. N. S. 622.

[5] Hitchcock *v.* Giddings, 4 Pri. 135.

timber on the estate, under the supposition that the tenant for life was then alive and entitled to cut the timber, but he was in fact then dead, it was held that the agreement was void, both in equity and at law.[1] So also where a fund was settled on two persons for life, with benefit of survivorship between them, and one of them sold his reversionary interest; but it turned out that at the time of the sale the other person was dead, so that the interest, which was supposed to be a reversionary one, had become an interest in possession, and the fact was unknown to both parties, it was held that the sale could not stand.[2] So also where a party having a claim upon another party, discharged the executors of the latter after his death from all claims, and there was a recital in the deed of release, that the party deceased had before his death possessed himself of a certain fund, which had been set apart to secure the claim, the release was set aside on it turning out that the recital was false, and that the fund had been paid in by him to a bank.[3] So also where a party had, upon a compromise, executed a general release in respect of partnership matters, it was held that he was entitled to relief, on the ground of a large item in which he was interested having been omitted by mistake in the account.[4]

Similar considerations apply where a vendor, through innocent mistake, makes a misrepresentation as to the subject-matter of the sale. If the subject-matter of the sale is so different in substance from what it was represented to be as to amount to a failure of consideration, the agreement will be set aside.[5]

So also if the vendor, in fixing the price, has altogether relied on information furnished to him by the purchaser, and

[1] Cochrane *v.* Willis, L. R. 1 Ch. App. 58.
[2] Colyer *v.* Clay, 7 Beav. 188.
[3] Hore *v.* Becher, 12 Sim. 465.
[4] Pritt *v.* Clay, 6 Beav. 503.
[5] *Supra*, p. 15, 24; Earl of Durham *v.* Legard, 34 Beav. 611.

such information turns out to have been (even unintentionally) incorrect, this may entitle the vendor, even after conveyance, to relief in equity.[1]

But a contract may be unconditional, although the parties are under a mistake respecting some matter which induces the contract. Thus, if the contract be absolute, and not with reference to collateral circumstances, as, for instance, if a ship on a voyage be sold, and the ship, at the time of the contract, be seriously damaged, to the ignorance of both parties, still the contract is valid.[2]

So also although there be a mutual mistake respecting the subject-matter of the agreement, yet if both parties are aware that the subject-matter is, from its nature, doubtful or uncertain, or is of a speculative or contingent character, the mistake goes for nothing either at law or in equity. A contract for the sale of a thing, the extent or value of which is understood to be unknown to both parties, or which is, from its nature or character, doubtful or uncertain, is valid and binding.[3] If a bargain depends on a contingent event, or the subject-matter of a contract be an uncertain thing, and the contingency or chance be known to both parties, neither of them can resist specific performance because the reality has turned out to be different from what he anticipated.[4]

There is mutual mistake which will vitiate a contract, or which at least will render it incapable of being specifically enforced in equity, if the one party does not think he is selling what the other thinks he is buying.[5]

Care must, however, be taken in distinguishing cases,

[1] Carpmael *v.* Powis, 10 Beav. 36.

[2] Barr *v.* Gibson, 3 M. & W. 390.

[3] Mortimer *v.* Capper, 1 Bro. C. C. 156; Ridgway *v.* Sneyd, Kay, 627; Baxendale *v.* Seale, 19 Beav. 601. See Davis *v.* Shepherd, L. R. 1 Ch. App. 410.

[4] Mortimer *v.* Capper, 1 Bro. C. C. 156; Baxendale *v.* Seale, 19 Beav. 601. See Monro *v.* Taylor, 3 Mac. & G. 718.

[5] Hitchcock *v.* Giddings, 4 Pri. 135; Cochrane *v.* Willis, L. R. 1; Ch. App. 58; Butterworth *v.* Walker, 13 W. R. 168; Baxendale *v.* Seale, 19 Beav. 601.

where the parties are under a mutual mistake as to the subject-matter of a contract, from cases where there is no doubt as to the subject-matter; but the one has, in fact, sold more than he thought he was selling, and the other has got more than he expected. In such cases relief cannot be had in equity, if there has been no unfairness on either side.[1] Where, for instance, that which the vendor intended to sell, and the purchaser to buy, was a leasehold interest, erroneously supposed to have a shorter time to run than it in fact had to run, it was held that the vendor had, after conveyance, no equity for relief.[2] So also where a man entitled to an interest in a residuary estate, assigns all his interest to a creditor, he is not entitled to relief if it afterward appear that the residuary estate consisted partly of a fund, the existence of which was not known to either of the parties at the time of the execution of the deed.[3]

Nor where several persons have joined in conveying an estate to a purchaser for a full consideration, can one of them be afterward heard to say that he was under a misapprehension as to the extent of his interest in the property.[4]

The same considerations which apply to the case of agreements entered into under a mutual mistake of the parties as to fact, apply to the case of compromises. A compromise which is founded on a mutual mistake of fact cannot be supported. If, for instance, a compromise is founded on the genuineness of an instrument which turns out to be forged, or if a suit which it is the object of a compromise to determine, turns out to have been already decided in favor of one of the parties, or if a compromise be founded on a will, which turns out to have been revoked by another will of which the parties are ignorant,

[1] O'Neill *v.* Whittaker, 1 Deg. & Sm. 83, 2 Ph. 338.
[2] *Ib.*
[3] Howkins *v.* Jackson, 2 Mac. & G. 372; Comp. Grieveson *v.* Kirsopp, 5 Beav. 287.
[4] Malden *v.* Menill, 2 Atk. 8. See Marshall *v.* Collett, 1 Y. & C. 232; Evans *v.* Jones, Kay, 29.

the transaction cannot be supported.[1] But the case is different if the fact in respect of which there is a mistake be included in the compromise, and be not the very foundation on which the compromise rests.[2] If one or more parties having, or supposing they have, claims upon a given subject-matter, or claims upon each other, agree to compromise those claims, and to come to a general settlement of the matters in dispute between them without resorting to litigation, and they act with good faith, and stand on an equal footing, and have equal means of knowledge as to the facts, the compromise is binding in equity.[3] It is not enough to invalidate the transaction that one of the parties may have been in error as to a fact included in it. A compromise cannot, however, be supported, unless it is fairly entered into, and after due deliberation.[4]

The principles which apply to the case of ordinary compromises between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced, if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend.[5]

Where an agreement is capable of being applied to different

[1] Toull. Cod. Cid. Liv. 3, tit. 3, c. 2. See Ashurst *v.* Mill, 7 Ha. 502; Lawton *v.* Campion, 18 Beav. 87; Trigge *v.* Lavallée, 15 Moo. P. C. 276.

[2] See Trigge *v.* Lavallée, 15 Moo. P. C. 276.

[3] Attwood *v.* ——, 1 Russ. 353; 5 Russ. 149; Roche *v.* O'Brien, 1 Ba. & Be. 330; Leonard *v.* Leonard, 2 Ba. & Be. 171; Naylor *v.* Winch, 1 Sim. & St. 555; Pickering *v.* Pickering, 2 Beav. 31, 56; Pritt *v.* Clay, 6 Beav. 503; Stewart *v.* Stewart, 6 Cl. & Fin. 911; Davis *v.* Chanter, 3 W. R. 321; Trigge *v.* Lavallée, 15 Moo. P. C. 270; Stainton *v.* Carron Co., 30 L. J. Ch. 713, *supra*, p. 79, 336.

[4] Scott *v.* Scott, 11 Ir. Eq. 75.

[5] Stockley *v.* Stockley, 1 V. & B. 23; Dunnage *v.* White, 1 Sw. 137; Gordon *v.* Gordon, 3 Sw. 400; Neale *v.* Neale, 1 Keen, 672; Westby *v.* Westby, 2 Dr. & War. 502; Stewart *v.* Stewart, 6 Cl. & Fin. 911; Persse *v.* Persse, 7 Cl. & Fin. 279; Houghton *v.* Lees, 1 Jur. N. S. 862; Williams *v.* Williams, 2 Dr. & Sm. 378.

things, or in different ways, and is accepted by each party with a different application, there is no real agreement between them, and consequently no contract.[1] If the one party intends to sell upon one set of terms, and the other party intends to buy upon a different set of terms, and the contention of either party is, under the circumstances of the case, reasonable, there is in reality no contract between them, or, at least, not such a contract as a court of equity will specifically enforce.[2]

It is not competent to a party to an agreement to assert an application of the agreement inconsistent with the terms agreed upon as expressing the common intention; but he is at liberty to show that it was understood by him to apply in a manner consistent with its terms, but different from the application accepted by the other party.[3] In such case, the agreement is said to contain a latent ambiguity, or one which appears only in the course of applying it.[4] A latent ambiguity is where it is shown that words equally apply to two different things or subject matters, and then evidence is admissible to show which of them was the thing or subject-matter intended.[5]

What is called a patent ambiguity, that is, a doubt or uncertainty appearing in the terms of the agreement as expressed by the parties themselves, cannot be altered or explained by extrinsic evidence; and if it is incapable of a rational interpretation, the agreement, at least to the extent of the ambiguity, is necessarily void.[6]

The application for relief on the ground of mistake must

[1] Leake on Contracts, p. 178. See Falck *v.* Gouch, 4 F. & F. 589, 591; West *v.* De Wezele, *ib.* 596, 599.

[2] Higginson *v.* Clowes, 15 Ves. 516; Clowes *v.* Higginson, 1 V. & B. 524; Neap *v.* Abbott, 1 C. P. Coop. temp. Cott. 382, 383; Baxendale *v.* Seale, 19 Beav. 601.

[3] Leake on Contracts, p. 178.

[4] *Ib.*

[5] Smith *v.* Jeffryes, 15 M. & W. 561, 562, *per* Alderson, B. See Raffles *v.* Wichelhaus, 2 H. & C. 906.

[6] See Coles *v.* Hulme, 8 B. & C. 568; Alder *v.* Boyle, 4 C. B. 635.

be made with due diligence.[1] In cases of mistake, as in cases of fraud, time runs from the discovery.[2]

The jurisdiction to relieve against mistake being an equitable one, it is exercised upon equitable principles. Transactions, although impeachable on the ground of mistake, are nevertheless subject to all real and just equities between the parties. The court will not set aside a transaction without restoring the party against whom it interferes, as far as possible, to that which shall be a just situation with reference to the rights which he had antecedently to the transaction.[3] If the court sees that it can restore the parties to their former condition, or place them in the same situation in which they would have stood but for the mistake, without interfering with any new right acquired by others, on the faith of the altered condition of the legal rights, the jurisdiction will be exercised.[4] A court of equity will not, however, relieve against a mistake, unless it is fully satisfied that it can make ample compensation.[5] If the court sees that the parties cannot be restored to that which shall be a just situation with reference to the rights which they had antecedently to the transaction, or that the mistake cannot be corrected without breaking in upon, or affecting the rights of innocent parties, who were not aware of the existence of the mistake, when their rights accrued, relief cannot be given.[7] As against *bonâ fide* purchasers for value without notice, no relief can be had in equity.[8] But if lands

[1] Beaumont *v.* Bramley, T. & R. 43; Denys *v.* Shuckburgh, 4 Y. & C. 53; Stone *v.* Godfrey, 5 D. M. & G. 76; Bentley *v.* Mackay, 31 Beav. 143; 31 L. J. Ch. 709; *supra*, p. 241.

[2] Brooksbank *v.* Smith, 2 Y. & Co. 60; *supra*, p. 247.

[3] *Supra*, p. 276.

[4] M'Alpine *v.* Swift, 1 Ba. & Be. 293; Dacre *v.* Gorges, 2 Sim. & St. 454. See Millar *v.* Craig, 6 Beav. 433; Meadows *v.* Meadows, 16 Beav. 404; Scholfield *v.* Templer, John. 165.

[5] Macalpine *v.* Swift, 1 Ba. & Be. 293; Dacre *v.* Gorges, 2 Sim. & St. 454; *supra*, p. 295.

[7] Malden *v.* Menill, 2 Atk. 8; Clifton *v.* Cockburn, 3 M. & K. 76; Blackie *v.* Clark, 15 Beav. 595; *Re* Saxon Life Insurance Co., 2 J. & H. 408; Bateman *v.* Boynton, L. R. 1 Ch. App. 359; *supra*, p. 249. Comp. Broughton *v.* Hutt, 3 D. & J. 501. See, also, Domat. Liv. 1, tit. 18, s. 1, art. 13–17.

[8] Malden *v.* Menill, 2 Atk. 8; Warrick *v.* Warrick, 3 Atk. 293; *supra*, p. 249.

shown to a purchaser are accepted in the conveyance under a name by which he did not know them, he may, by getting in an outstanding legal estate, hold them, even as against a subsequent purchaser for valuable consideration, and without notice.[1]

If the subject-matter of the transaction be real estate, and there has been a conveyance, a reconveyance will be ordered, if a case be made out for the interference of the court.[2] *

On setting aside a transaction on the ground of mistake, the court may, with the view of putting the parties in the position in which they have an equity to stand, annex conditions to the decree. In a case, for example, where, by a mistake in drawing up an instrument, the rent named as payable upon the lease of premises was considerably less than the amount actually agreed upon between the parties, and the mistake was known to one of the parties at the time of the execution of the instrument, but not to the other, the court gave the lessee an election to continue in the tenancy, on consenting to pay the amount of rent, which ought to have been inserted in the instrument, or to abandon the lease, and pay for use and occupation during the period he had been in possession of the premises at the higher rate, being compensated for all repairs of a permanent character, but not for the expense of taking possession of the premises and establishing himself in

[1] Oxwick *v.* Brockett, 1 Eq. Ca. Ab. 355.

[2] Cox *v.* Bruton, 5 W. R. 544; Leuty *v.* Hillas, 2 D. & J. 120; Malmesbury *v.* Malmesbury, 31 Beav. 418, *supra*, p. 277, 278. See as to terms of reconveyance, *supra*, pp. 278–282

* A court of equity alone can reform a written instrument. However a mistake may have been induced, it can find no recognition until the contract has been reformed and made to conform to the real intention of the parties. Boyer *v.* Wilson, 32 Md. 122; Holmes *v.* Barker, 3 Johns. 506.

business. It was also held that the lessor was responsible to refund the moneys advanced to the lessee upon the security of the lease, with costs; the lessee being liable over to the lessor for repayment of the same, on the ground that, if the lease were rejected, the premises must stand as a security for the money so advanced; and if the lease was accepted, it was primarily liable for the repayments of the same to the lessor.[1]

Courts of equity have jurisdiction on the ground of mistake to relieve against the defective execution of a power. If the formalities required by a power are not strictly complied with, an appointment under the power is invalid at law, and the property which is the subject of the power will go as in default of appointment. In equity, however, if an intention to execute the power be sufficiently declared, but, by reason of some informality, the act declaring the intention is not an execution of the power, the court will, in favor of certain parties, aid the defective execution, by compelling the person seised of the legal estate to do that which was intended to be done.[2] The supplying the surrender of a copyhold, and the supplying the execution of a power which is defective in form, go hand in hand. Wherever there is a decision that the court will supply a surrender, it follows that the court will also supply the defective execution of a power.[3]

The powers to which the equity extend are those which have been created by way of use, as distinct from bare authorities conferred by law. Acts done under authorities of this latter kind—as, for example, leases or conveyances by a tenant in tail—are only binding when regular and complete. The

[1] Garrard *v.* Frankel, 30 Beav. 445.

[2] Chapman *v.* Gibson, 3 Bro. C. C. 229; Shannon *v.* Bradstreet, 1 Sch. & Lef. 63; Sayer *v.* Sayer, 7 Ha. 377.

[3] Sayer *v.* Sayer, 7 Ha. 387; *per* Wigram, V.-C.; Chapman *v.* Gibson, 3 Bro. C. C. 229.

principle of the distinction appears to be, that powers limited by use are mere reservations out of the original ownership, constituting the donee a *quasi* owner, and the remainderman a *quasi* heir; and, consequently, that in conformity with this hypothesis, the donee's contracts for value ought to bind the remainderman, and his meritorious intention, if unaltered, ought to have the same effect.[1] The soundness of this equity has been questioned by Sir William Grant, and its principle seems difficult to sustain. For the power given, though doubtless, in some sense, a modified ownership, does not confer an absolute right to dispose of the property, but a right to do so in a specific way; and the chance that the power may never be executed, or that it may not be executed in the manner prescribed, is an advantage given to the remainderman. If, therefore, his interest is to be regarded, it is difficult to see why he should be bound by any other than the prescribed act, for he is a stranger to any equity between the donee of the power and the party in whose favor it is intended to be executed. If, on the other hand, his interest is subordinate to the intention of the donee of the power, the intention of such donee ought to be sustained, whatever be the consideration on which it rests.[2]

Whatever opinion may, however, be entertained as to the original soundness of the equity, there is no question that it is established by precedent; but it is confined to cases of execution formally defective, or of contract amounting to such defective execution.[3]* If there be no such execution or contract, the court cannot interpose; for unless where the power

[1] Adams' Doct. Eq. 99.
[2] Holmes *v.* Coghill, 7 Ves. 506; 12 Ves. 206; Adams' Doct. Eq. 99.
[3] Adams' Doct. Eq. 100.

* Howard *v.* Carpenter, 11 Md. 259; Lines *v.* Darden, 5 Fla. 51; Mitchell *v.* Denson, 29 Ala. 327; Lippincott *v.* Stokes, 2 Halst. Ch. 122.

is in the nature of a trust, the donee has his choice whether to execute it or not; and if he does not execute, or attempt to execute, there is no equity to execute it for him, or to do that for him which he did not think fit to do himself.[1] Nor can an execution be aided in equity, if the defect be not formal, but in the substance of the power, for such aid would defeat the intention of the donor. If, for example, a tenant for life has power to lease with the consent of trustees or others, an agreement by the tenant for life alone to lease will not be aided.[2]

The only persons in whose favor equity will interpose to supply the defect in the execution of a power are, a *bonâ fide* purchaser for valuable consideration,[3] a creditor,[4] a charity,[5] a wife, or a legitimate child.[6] To no other persons, except a wife and legitimate child, will the aid of the court be granted upon the ground of a meritorious consideration.[7] The equity does not extend to the case of a defective execution by a wife in favor of her husband;[8] nor to a defective execution in favor of a natural child, a father, mother, brother, sister, nephew, or cousin: *â fortiori* it does not extend to a volunteer.[9]

The character of purchaser, creditor, wife, or child, must be borne by the party claiming relief in relation to the donee of the power and not to the person creating the power.[10]

In Wilkinson *v.* Nelson,[11] a deed of appointment in favor of some of the objects of a power, was rectified by the inser-

[1] Tollet *v.* Tollet, 2 P. Wms. 489.
[2] Lawrenson *v.* Butler, 1 Sch. & Lef. 13.
[3] Hughes *v.* Wells, 9 Ha. 769; Affleck *v.* Affleck, 3 Sm. & G. 394; Sug. Pow. 533, 534; White & Tud. L. C. vol. I, p. 209.
[4] Sug. Pow. 533, 534.
[5] Innes *v.* Sayer, 7 Ha. 377.
[6] Hervey *v.* Hervey, 1 Atk. 567; Medwin *v.* Sandham, 3 Sw. 686; Proby *v.* Landor, 28 Beav. 504; White & Tud. L. C. vol. I, p. 211.
[7] Moodie *v.* Reid, 1 Madd. 516.
[8] *Ib.*
[9] Sug. Pow. 535, and cases cited; White & Tud. L. C. vol. I, 212.
[10] Sug. Pow. 537.
[11] 7 Jur. N. S. 481.

tion of a hotchpot clause, the court being satisfied that the intention of the donee of the power was to produce equality, and that the clause had been omitted by mistake.

It is not sufficient in order to constitute a case entitling a party to relief in equity on the ground of the defective execution of a power that there should be a mere intention on the part of the donee to execute the power, without some steps taken to give it a legal effect. Some steps must be taken or some acts must be done with this sole and definite intention, and such steps or acts must be properly referable to an intention to execute the power.[1] A mere parol promise or agreement to execute the power is not sufficient.[2] * But if an intention to execute the power appears clearly by some paper or instrument in writing, equity will aid a defect which arises from the instrument itself being informal or inappropriate;[3] as, for instance, where the donee of a power covenants,[4] or merely enters into an agreement, not under seal, to execute the power,[5] or when by his will he desires the remainderman to create the estate authorized by the power,[6] or if he promises by letter to grant an estate which he could only do by the exercise of his power.[7] In all these and the like cases equity will supply the defect. So also a recital by the donee of a power, in the marriage settlement of one of his daughters, who was one of the objects of the power, that she was entitled to a share of a sum to which she could only be entitled by his appointment, has been held sufficient evidence of his intention to execute the power, so as to be aided in equity,[8] and even an

[1] Sug. Pow. 550, 551.
[2] Carter *v.* Carter, Mose. 370; Shannon *v.* Bradstreet, 1 Sch. & Lef. 72.
[3] Sayer *v.* Sayer, 7 Ha. 377.
[4] Sug. Pow. 550.
[5] Shannon *v.* Bradstreet, 1 Sch. & Lef. 52; Dowell *v.* Dew, 1 Y. & C. C. C. 345 Sug. Pow. 550.
[6] Vernon *v.* Vernon, Amb. 3; Sug. Pow. 550.
[7] Campbell *v.* Leach, Amb. 740; Sug. Pow. 550.
[8] Wilson *v.* Piggott, 2 Ves. Jr. 351. See Poulson *v.* Welling, 2 P. Wms. 533

* Mitchell *v.* Denson, 29 Ala. 327; Barr *v.* Hatch, 3 Ohio, 527.

answer to a bill in chancery stating that the party does appoint and intend by a writing in due form to appoint, will be an execution of the power for this purpose.[1] So also if the power ought to be executed by deed, but it is executed by will, the defective execution will be supplied.[2]

The like rule prevails, where there has been a defective execution of a power by a formal or appropriate instrument: as, for instance, if a deed be required by the power to be executed in the presence of a certain number of witnesses, and it be executed in the presence of a smaller number of witnesses: or if it is required to be signed and sealed, and sealing is omitted.[3] In wills not coming within the operation of the Wills Act, 1 Vict. c. 26, a defect in the execution of a power, consisting in the want of the number of witnesses required by the power, was supplied in equity.[4] But the power to assist defective executions of appointments within the statute has ceased as to wills made on or after the 18th January, 1838. The validity of an appointment by will, so far as regards execution and attestation, now wholly depends on the Statute Law.[5]

Equity will in no case aid a defective execution of a power, if the intention of the person creating the power would be thereby defeated. Although a power will be aided, if it has been executed by a will, when it ought strictly to have been executed by deed,[6] the case is otherwise, if a power, required to be exercised by will, has been executed by deed.[7] The intention of a power to appoint by will being to reserve to the donee of the power a certain control over the estate, until the

[1] Carter *v.* Carter, Mose. 365.

[2] Tollet *v.* Tollet, 2 P. Wms. 489.

[3] Wade *v.* Paget, 1 Bro. C. C. 363; Cockerell *v.* Cholmeley, 1 R. & M. 424. An appointment by deed is now rendered valid in many cases, although not executed or attested with all the solemnities required by the instrument creating the power, 22 & 23 Vict. c. 35, s. 12.

[4] Wilkie *v.* Holmes, 1 Sch. & Lef. 60 n.; Lucena *v.* Lucena, 5 Beav. 249; Sug. Pow. 547.

[5] Sug. Pow. p. 559.

[6] *Supra*, p. 372.

[7] Reid *v.* Shergold, 10 Ves. 378, 380.

moment of the death of the donee, if the donee of such a power should execute an appointment or a conveyance of the estate by an absolute deed, it will be invalid, because such an appointment or conveyance, if it avail to any purpose, must avail to the destruction of the power, since it would be no longer revocable, as a will would be. The distinction between this case and the case of a power executed by will, though required to be executed by deed, is marked and obvious. An act done not strictly according to the terms of the power, but consistent with its intent, may be upheld in equity. But an act which defeats the intention of the person creating the power, and determines the control over the property, which was meant to rest in the donee, is repugnant to it, and cannot be deemed in any just sense to be an execution of it.[1]

In all cases, however, where the aid of the court is sought for the purpose of aiding the defective execution of a power, the party seeking relief must stand upon some equity superior to that of the party against whom he seeks it.[2] There can be no relief, if the aid of the defective execution would be inequitable to other parties, or if it is repelled by some counter-equity.[3] As against a purchaser for valuable consideration without notice, equity will in no case aid the defective execution of a power.[4] But as against a remainderman, who takes, although by purchase, subject to the power,[5] and also in general as against an heir-at-law or customary heir,[6] relief may be had against the defective execution of a power. Whether, however, equity will afford its aid as against an heir totally unprovided for, seems doubtful upon the authorities.[7]

[1] *Ib.*, Sug. Pow. 560, 561. See, also, Cockerell *v.* Cholmeley, 1 R. & M. 424; 2 R. & M. 751; but see, 22 & 23 Vict. c. 35, s. 13.

[2] Sug. Pow. 541; 2 Chanc. Pow. 502, 504, 597.

[3] *Supra*, pp. 366, 367.

[4] 1 Foub. Eq. Bk. 1, ch. 1, s. 7, n. (*v*).

[5] Tollet *v.* Tollet, 2 P. Wms. 489; Shannon *v.* Bradstreet, 1 Sch. & Lef. 52.

[6] Smith *v.* Ashton, 1 Ch. Ca. 263, 264.

[7] Chapman *v.* Gibson, 3 Bro. C. C. 229; Hills *v.* Downton, 5 Ves. 564; Braddick *v.* Mattock, 6 Madd. 363; Rodgers *v.* Marshall, 17 Ves. 294; Sug. Pow. 545; White & Tud. L. C. vol. I, pp. 212, 213.

In cases of defective execution of powers a distinction exists between powers which are created by private persons, and those which are specially created by, or come within, a statute. The latter are construed with more strictness, and whatever formalities are required by the statute must be punctually complied with.* In the case of powers which are in their own nature statutable, equity must follow the law, be the consideration ever so meritorious. Thus the power of a tenant-in-tail to make leases under a statute, if not executed in the requisite form prescribed by the statute will not be made available in equity, however meritorious the consideration may be;[1] and, indeed, it may be stated as generally true, that the remedial power of courts of equity does not extend to the supply of any circumstances, for the want of which the legislature has declared the instrument void, for otherwise equity would defeat the very policy of legislative enactments.[2]

Although a court of equity will not in general aid the defective execution of a power in favor of a volunteer except in particular cases,[3] the defective execution of a power will be aided in favor of a volunteer, when a strict compliance with the power has been impossible, from circumstances beyond the control of the party, as when the prescribed witnesses could not be found; or where an interested party having possession of the deed creating the power, has kept it from the sight of the party executing the power, so that he could not ascertain the formalities required.[4]

So also although a court of equity will in no case aid the non-execution of a power, as distinguished from its defective

[1] Darlington *v.* Pulteney, Cowp. 267; 2 Chanc. Pow. 541–545; Sug. Pow. 209.

[2] 1 Fonb. Eq. Bk. 1, ch. 1, s. 7, n. (*t*); Curtis *v.* Perry, 6 Ves. 739, 745, 746, 747; Mestaer *v.* Gillespie, 11 Ves. 621, 624, 625; Thompson *v.* Smith, 1 Madd. 395.

[3] *Supra*, p. 370.

[4] 1 Fonb. Eq. Bk. 1, ch. 5, s. 2, n. (*h*).

* Bright *v.* Boyd, 1 Story, 478; McBride *v.* Wilkinson, 29 Ala. 662.

execution,[1] the case is otherwise, if the execution of a power has been prevented by fraud, as where the deed creating the power has been fraudulently retained by the person interested in its non-execution. In such and similar cases equity will grant relief on the ground of fraud.[2]

In like manner, as equity will give relief against mistake in written instruments, so also it will grant relief and supply defects when, by mistake, parties have omitted any acts or circumstances necessary to give effect and validity to written instruments. Thus equity will supply any defect of circumstances in conveyances occasioned by mistake: as of a surrender in the case of copyholds: so also misprision and omission in deeds, awards, and other solemn instruments, whereby they are defective at law.[3] It will also interfere in cases of mistake in judgments, and in matters of record injurious to the right of the party.[4]

The equity for supplying surrenders of copyholds, originates in the doctrine that a copyhold does not pass by grant or devise, but by a surrender into the hands of the lord to the use of the grantee or the will. In the one case the grantee is entitled to immediate admission; in the other, the person designated in the will is entitled to admission on the testator's death. If a grant or devise were made without a previous surrender, it was formerly inoperative at law; but if it were made for a valuable consideration, and in particular cases, if it were made for a meritorious consideration, the surrender might be supplied in equity.[5] The supplying the surrender of a copyhold and the supplying the execution of a power which

[1] Tollet *v.* Tollet, 2 P. Wms. 489; Piggott *v.* Penrice, Com. 250, Gilb. Eq. Rep. 138.

[2] *Supra*, p. 211, 212.

[3] 1 Fonb. Eq. Bk. 1, ch. 1, s. 7.

[4] Jeremy Eq. Jur. p. 492, Story, Eq. Jur. 166. See as to jurisdiction of courts of law over their own records on the ground of mistake, Cannan *v.* Reynolds, 5 E. & B. 301.

[5] Rogers *v.* Marshall, 17 Ves. 294; but see as to case of meritorious consideration, Jefferys *v.* Jefferys, Cr. & Ph. 138; Tatham *v.* Vernon, 29 Beav. 604; White & Tud. L. C., vol. I, p. 209.

is defective in form, go hand in hand. Wherever there is a decision that the court will supply the one, it follows that it will also supply the other.[1]

The jurisdiction to supply a surrender existed whether the gift were by deed or will,[2] but it was ordinarily called into exercise in the case of wills. It has, however, been rendered of little practical importance by the enactment that all real estate may be devised by will, and that copyholds shall be included under that description, notwithstanding that the testator may not have surrendered them to the use of his will, nor have even been himself admitted to them.[3]

In like manner, as equity will give relief against mistakes in written instruments, will it give effect to the real intention of the parties, as gathered from the objects of the instrument and the circumstances of the case, although the instrument may be drawn up in a very inartificial and untechnical manner. For, however just the general rule may be, *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*,[4] yet that rule shall not prevail to defeat the manifest intent and object of the parties where it is clearly discernible on the face of the instrument, and the ignorance, or blunder, or mistake of the parties has prevented them from expressing it in the appropriate language.[5]

In regard to mistake in awards, the court will not relieve against an award on the ground of mistake, either in matter of law or fact, if the award is within the submission, and contains the honest decision of the arbitrators after a full and fair hearing of the parties, and the mistake does not appear on the face of the award, or is not disclosed by some contemporaneous writing.[6]* But if the mistake appears on the face of the

[1] Sayer *v.* Sayer, 7 Ha. 387, *per* Wigram V.-C., *supra*, p. 368.
[2] Rodgers *v.* Marshall, 17 Ves. 294.
[3] 1 Vict. c. 26, s. 3.
[4] Co. Litt. 147 a.
[5] Jeremy Eq. Jur. p. 367, 368, Story Eq. Jur. 168.
[6] Corneforth *v.* Geer, 2 Vern. 705;

* 1 Bouck *v.* Wilber, 4 Johns. Ch. 405; Card *v.* Wallace, 7 Dana, 190;

award,[1] or is disclosed by some contemporaneous writing,[2] or if the arbitrator voluntarily admit a mistake,[3] or state circum-

Ching *v.* Ching, 6 Ves. 282; Young *v.* Walter, 9 Ves. 365; Goodman *v.* Sayers, 2 J. & W. 249; Wood *v.* Griffith, 1 Sw. 59; Steff *v.* Andrews, 2 Madd. 5; Price *v.* Jones 2 Y. & J. 114; Haigh *v.* Haigh, 3 D F. & J. 157.

[1] Morgan *v.* Mather, 2 Ves. Jr. 15.

[2] Hogge *v.* Burgess, 3 H. & N. 293.

[3] Knox *v.* Symonds, 1 Ves. Jr. 369; Mills *v.* Bowyers' Society, 3 K. & J. 68; but see Philipps *v.* Evans, 12 M. & W. 309; Hogge *v.* Burgess, 3 H. & N. 293.

Cleaveland *v.* Dixon, 4 J. J. Marsh. 226; Torrance *v.* Lamsden, 3 McLean, 509; Winship *v.* Jewett, 1 Barb. Ch. 173; Bell *v.* Price, 2 N. J. 578; Nance *v.* Thompson, 1 Sneed, 321; Johnson *v.* Noble, 13 N. H. 286.

Nothing is to be considered apparent upon an award but what forms a part of it; no calculations or any of the grounds of it unless annexed to it or incorporated with it at the time of delivery. Taylor *v.* Nicholson, 1 Hen. & Munf. 67; Wheatley *v.* Martin, 6 Leigh. 62.

If arbitrators certify the principles upon which they proceed, a mistake may be corrected. It is incompetent to show by proof a mere mistake of law or of fact. Bumpass *v.* Webb, 4 Port. 65; Pleasants *v.* Ross, 1 Wash. (Va.), 156; Ryan *v.* Blunt, 1 Dev. Eq. 382.

Mistakes, which are grounds for exceptions to the report at law, will not constitute good grounds for interference in equity. Hurst *v.* Hurst, 2 Wash. C. C. 127; Head *v.* Muir, 3 Rand. 122; Wheatley *v.* Martin, 6 Leigh. 62; Howard *v.* Warfield, 4 H. & McH. 21.

An award may be set aside in equity for a palpable mistake of law or fact upon a material point. Hartshorn *v.* Cuttrell, 1 Green's Ch. 297; Van Cortland *v.* Underhill, 17 Johns. 405; 2 Johns. Ch. 339; Hattin *v.* Detinaud, 2 Dessau. 570.

The mistake must be of such a character as to show that the deduction of the arbitrator was a mistaken inference from the facts, or that the facts themselves did not authorize the conclusions drawn from them. Cleaveland *v.* Dixon, 4 J. J. Marsh. 226; Ewing *v.* Beauchamp, 2 Bibb, 456.

It must appear that the arbitrators intended to be governed strictly by the law or the fact mistaken. Hollingsworth *v.* Lupton, 4 Munf. 114.

An error in judgment upon the merits is no ground whatever for the interposition of a court of equity. Hartshorn *v.* Cuttrell, 1 Green. Ch. 297; Boston Water Power Co. *v.* Gray, 6 Met. 131; Burchell *v.* Marsh, 17 How. 344; Cromwell *v.* Owings, 6 H. & J. 10; Van Cortland *v.* Underhill, 17 Johns. 405; McVichar *v.* Wolcott, 4 Johns. 509; Rudd *v.* Jones, 4 Dana, 229; Ormsby *v.* Bakewell, 7 Ohio, 98; Head *v.* Muir, 3 Rand. 122; Radcliffe *v.* Wightman, 1 McCord's Ch 408.

When it appears that the parties intended to submit a question of law

stances which show clearly that the proceedings have been erroneous,[1] equity will relieve or remit the award back to the arbitrators under the Common Law Procedure Act,[2] unless the submission has been made a rule of court under statute 9 & 10 Will. 3, c. 15, in which case application must be made to the court in which it has been made a rule.

In regard to mistakes in wills, a court of equity has jurisdiction to correct them when they are apparent on the face of the will, or may be made out by a due construction of its terms. But the mistake must be apparent on the face of the will, otherwise there can be no relief; for at least since the Statute of Frauds, which requires wills to be in writing (whatever may have been the case before the statute),[3] parol evidence, or evidence *dehors*, the will is not admissible to contradict, vary, or control the words of the will, although it is in certain cases admissible to explain the meaning of the words which the testator has used.[4]*

A mistake cannot be corrected or an omission supplied, unless it is perfectly clear by fair inference from the whole will that there is such a mistake or omission.[5] The first thing

[1] Mills *v.* Bowyers' Society, 3 K. & J. 66. See Bankart *v.* Houghton, 3 D. F. & J. 18.

[2] 17 & 18 Vict. c. 125, s. 8; Mills *v.* Bowyers' Society, 3 K. & J. 66; Aitken's Arbitration, 3 Jur. N. S. 1296. See Hodgkinson *v.* Fernie, 3 C. B. N. S. 189; Hogge *v.* Burgess, 3 H. & N. 293.

[3] See Milner *v.* Milner, 1 Ves. 106; Wigram on Wills, p. 5.

[4] Milner *v.* Milner, 1 Ves. 106; Ulrich *v.* Litchfield, 2 Atk. 373; Jarm. on Wills, vol. I, p. 386: Wigram on Wills, pp. 5, 8.

[5] Philipps *v.* Chamberlaine, 4 Ves. 57.

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alone, the decision is binding, though contrary to law. Smith *v.* Smith, 4 Rand. 95; Crabtree *v.* Green, 8 Geo. 8.

A mistake in judgment upon a doubtful question of law is not sufficient. Campbell *v.* Western, 3 Paige, 124; Morris *v.* Ross, 2 Hen. & Munf. 408; Cleary *v.* Cour, 1 Hey. 125.

* Trexter *v.* Miller, 6 Ired. Eq. 248; Goode *v.* Goode, 22 Mo. 518; Hunt *v.* White, 24 Tex. 643; Jackson *v.* Payne, 2 Met. (Ky.) 567.

An omission of the requisite number of subscribing witnesses cannot be corrected. Nutt *v.* Nutt, 1 Freeman's Ch. 128.

to be proved in all cases is that there is a mistake.[1] The mistake must be a clear mistake or a clear omission, demonstrable from the structure and scope of the will.[2] Thus, if in a will there is a mistake in the computation of a legacy, it will be rectified in equity.[3] So, if there is a mistake in the name, description, or number of the legatees intended to take,[4] or in the property intended to be bequeathed,[5] and the mistake is clearly demonstrable from the structure and scope of the will, equity will correct it.

Relief cannot, however, be had, unless the mistake be clearly made out.[6] And so, if the words of the bequest are plain, evidence of a different intention is inadmissible to establish a mistake;[7] nor will a mistake be rectified, if it does not appear clearly what the testator would have done in the case, if there had been no mistake.[8] But if the omission of some word or phrase is so palpable on the face of the will, that no difficulty occurs in pronouncing the testator to have used an expression which does not accurately convey his meaning, and it is not only apparent that he has used the wrong word or phrase, but it is also apparent what is the right one, the court will substitute the right one.[9]* Although the particulars

[1] Mellish *v.* Mellish, *ib.* 49.

[2] *Ib.*; Philipps *v.* Chamberlaine, *ib.* 51, 57; D'Mare *v.* Robello, 3 Bro. C. C. 445; Purse *v.* Snaplin, 1 Atk. 415; Holmes *v.* Custance, 12 Ves. 279.

[3] Milner *v.* Milner, 1 Ves. 106; Danvers *v.* Manning, 2 Bro. C. C. 18; Door *v.* Geary, 1 Ves. 255, 256; Giles *v.* Giles, 1 Keen, 692.

[4] Stebbing *v.* Walkey, 2 Bro. C. C 85; River's Case, 1 Atk. 410; Parsons *v.* Parsons, 1 Ves. Jr. 266; Beaumont *v.* Fell, 2 P. Wms. 141; Hampshire *v.* Peirce, 2 Ves. 216; Bradwin *v.* Harpur, Ambl. 374; Jarm. on Wills, vol. 1, p 393; *ib.* vol. 2, pp. 178, 181.

[5] Door *v.* Geary, 1 Ves. 255; Selwood *v.* Mildmay, 3 Ves. 306.

[6] Holmes *v.* Custance, 12 Ves. 279.

[7] Chambers *v.* Minchin, 4 Ves. 676.

[8] See Smith *v.* Maitland, 1 Ves. Jr. 363.

[9] Taylor *v.* Richardson, 2 Drew. 16.

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* Wood *v.* White, 32 Me. 340.

The name of one legatee cannot be stricken out and that of another inserted. Gates *v.* Cole, 1 Jones' Eq. 110.

The word "dollars" may be inserted after fifteen hundred. Snyder *v.* Warbasse, 3 Stockt. 463.

which the testator has included in his description of the property, the subject of the gift, should be inaccurate, the gift will be upheld if there be enough of correspondence to afford the means of identification.[1] If the property the subject of the gift be capable of being accurately identified, certain errors in the description will not vitiate the gift.[2]

The same considerations apply, when the particulars which the testator has included in his description of the object of the gift are inaccurate. If the devisee or legatee is so designated as to be distinguished from every other person, the inaptitude of some of the particulars introduced in the description is immaterial.[3] If there is a person to answer the name given in the will, it is immaterial that any further description does not precisely apply.[4] A gift by will to a person described as the husband, or wife, or widow of another, is not in general affected by the fact of the devisee or legatee not actually answering the description, by reason of the invalidity of the supposed marriage, or by reason of the second marriage of the supposed widow or otherwise.[5] And on the same principle a legacy to a person described as the testator's intended wife, has been held to be payable although the testator did not eventually marry her.[6] A different rule, however, prevails where a fraud has been practiced on a testator, the knowledge or discovery of which, there is reason to believe, would have destroyed or removed the motive for the gift. When, for example, a testatrix under a power of appointment bequeathed a legacy to a man whom she described and with whom she lived as her husband, but the marriage was invalid on account of his having a wife at the time, which fact was not known to the testatrix, the be-

[1] Jarm. on Wills, vol. 1, p. 394.

[2] Door *v.* Geary, 1 Ves. 255; Selwood *v.* Mildmay, 3 Ves. 306; Jarm. on Wills, vol. 1, p. 394.

[3] Jarm. on Wills, vol 1, p. 399.

[4] Standen *v.* Standen, 2 Ves. Jr. 589; Del Mare *v.* Robello, 3 Bro. C. C. 446; Holmes *v.* Custance, 12 Ves. 279.

[5] Giles *v.* Giles, 1 Keen, 685, 692, 693; Rishton *v.* Cobb, 5 M. & C. 145; *Re* Petts, 27 Beav. 576.

[6] Schloss *v.* Stiebel, 6 Sim. 1.

quest was held void.[1] The question in all such cases is, whether the mistake of the testator has been induced by the fraud of the object of his intended bounty. Though it is clear that a legacy given to a person in a character which the legatee does not fill, and by the fraudulent assumption of which character the testator has been deceived, will not take effect; yet if the testator is not deceived, although a false character is in fact assumed, the legacy will be good. *A fortiori* it will be good, if both parties not only knew the actual facts, but are designedly parties to the assumption of the false character.[2] A false reason, however, given for a legacy, is not alone a sufficient ground to avoid the act or bequest in equity. To have such an effect, it must be clear that no other motive mingled in the legacy, and that it constituted the substantial ground for the act or bequest.[3]

If the language of a will is either capable of more than one meaning, or is incapable of any certain meaning, parol evidence cannot be admitted to show what the testator intended to have expressed.[4] But parol evidence is admissible for the purpose of explaining the meaning of the terms he has used.[5] The court in construing a will cannot shut its eyes to the state of facts under which the will was made.[6] Although in general evidence as to the amount or state of the testator's property, is inadmissible to influence the construction of the will;[7] yet, if he inaccurately or imperfectly describes the gift, so as to make the interpretation of the words in their primary sense impos-

[1] Kennell *v.* Abbott, 4 Ves. 804.

[2] Giles *v.* Giles, 1 Keen, 685, 692, 693.

[3] Kennell *v.* Abbott, 4 Ves. 802. The civil law seems to have proceeded upon the same ground. The Digest says, *Falsam causam legato non obesse verius est; quia ratio legandi legato non cohæret. Sed plerumque doli exceptio locum habebit, si probetur, alias legaturum non fuisse.* Dig. Lib. 35, tit. 1, leg. 72, § 6. The meaning of this passage is that a false reason given for the legacy is not of itself sufficient to destroy it. But there must be an exception of any fraud practiced from which it may be presumed that the person giving the legacy would not, if that fraud had been known to him, have given it. Kennell *v.* Abbott, 4 Ves. 803.

[4] Wigram on Wills, 95.

[5] *Ib.* 8. See Grey *v.* Pearson, 6 H. L. 106.

[6] Jarm. on Wills, vol. 1, pp. 393, 394.

[7] *Ib.* 394, and cases cited.

sible, parol evidence is admissible.[1] The principle is exemplified in those cases in which a devise of land at a given place has been extended to property not strictly answering to the locality, because there is none which does precisely correspond to it;[2] or in which an apparently specific bequest of stock in the public funds has been held to authorize payment of the legacy out of the general personal estate, the testator having no such stock when he made the bequest.[3] So also if the subject of devise is described by reference to some extrinsic fact, it is not merely competent but necessary to admit extrinsic evidence to ascertain the subject of devise.[4]

The same considerations apply when the description or terms employed by the testator are insufficient to determine the person intended by the testator. If the object of the testator's bounty, or the person meant by him, is described in terms which are applicable indifferently to more than one person, parol evidence is admissible to prove which of the persons so described was intended by the testator.[5]

If the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the meaning of the testator, evidence to prove the sense in which he intended to use them is, as a general proposition, inadmissible.[6] Thus, evidence is inadmissible for the purpose of filling up a total blank in a will,[7] or inserting a devise inadvertently omitted by the mistake of the person drawing, making, or copying the will,[8] or of proving what was meant by an unintelligible

[1] Fonnereaux *v.* Poyntz, 1 Bro. C. C. 472; Att.-Gen. *v.* Grote, 3 Mer. 316; Colpoys *v.* Colpoys, Jac. 451; Wigram on Wills, 65.

[2] Doe *v.* Roberts, 1 B. & Ald. 407; Jarm. on Wills, vol. I, p. 393.

[3] Selwood *v.* Mildmay, 3 Ves. 306; Jarm. on Wills, vol. I, p. 394.

[4] Sanford *v.* Raikes, 1 Mer. 646, *per* Sir W. Grant; Webb *v.* Byng, 1 K. & J. 580; Jarm. on Wills, vol. I, p. 397.

[5] Wigram on Wills, 109; Jarman on Wills, vol. I, pp. 400–403, and cases cited.

[6] Wigram on Wills, pp. 94, 98.

[7] Baylis *v.* Att.-Gen., 2 Atk. 239; Castledon *v.* Turner, 3 Atk. 257; Hunt *v.* Hort, 3 Bro. C. C. 311; Taylor *v.* Richardson, 2 Drew, 16.

[8] Newburgh *v.* Newburgh, 5 Madd. 364; Jarm. on Wills, vol. I, p. 382. It would, however, seem that if a clause

word;[1] or of proving that a thing in substance different from that described in the will was intended;[2] of changing the person described;[3] or of reconciling conflicting clauses in a will.[4]

Where a testator, by a codicil, revokes a devise or bequest in his will, or in a previous codicil, expressly grounding such revocation on the assumption of a fact which turns out to be false, the revocation does not take effect, being, it is considered, conditional and dependent on a contingency which fails.[5] So also if a will is cancelled by mistake, or on the presumption that a later will is good, which proves void, the heir is not let in, but the mistake may be relieved against.[6] In such case equity does not alter the will; it merely relieves the party from the effect of the mistake, thus placing him in the same condition as if the mistake had not happened.[7]

An election made by a party under a mistake of facts, or a misconception as to his rights, is not binding in equity. In order to constitute a valid election, the act done must be with a full knowledge of the circumstances of the case, and the right to which the person put to his election was entitled.[8] In order to presume an election from the acts of any person, that person must be shown to have had a full knowledge of all the requisite circumstances, as to the amount of the different properties, his own rights in respect of them, &c.[9] A person who has elected under a misconception, is entitled to make a fresh election.[10]

be inadvertently introduced, there may be an issue to try whether it is part of the testator's will. *Ib.;* Wigram on Wills, 121.

[1] Goblett *v.* Beechey, 3 Sim. 24.

[2] Selwood *v.* Mildmay, 3 Ves. 306.

[3] Del Marc *v.* Robello, 1 Ves. Jr. 412.

[4] Ulrich *v.* Litchfield, 2 Atk. 372, *per* Lord Hardwicke.

[5] Campbell *v.* French, 3 Ves. 321; Doe *v.* Evans, 10 A. & E. 228; Jarm on Wills, vol. I, p. 170.

[6] Onions *v.* Tyrer, 1 P. Wms. 345.

[7] *Ib.*

[8] Wintour *v.* Clifton, 21 Beav. 468; affirmed 3 Jur. N. S. 74.

[9] Wake *v.* Wake, 1 Ves. Jr. 335, and the other cases mentioned; 1 Sw. 381, n.; Reynard *v.* Spence, 4 Beav. 103; Edwards *v.* Morgan, 13 Pri. 782; 1 Bligh's N. S. 401; Price *v.* Brice, 2 Moll. 21.

[10] Kidney *v.* Coussmaker, 12 Ves. 136; Jarman on Wills, vol. I, p. 441.

The court will not inquire into the fact of whether a testator was mistaken or not with reference to his daughter's health and capacity, assigned by his will as a condition for imposing a condition in restraint of marriage.[1]

The costs of the suit, in cases of mistake, depend on the conduct of the parties.[2] * If a deed is set aside or varied on the ground of mistake, the decree will be with costs against the defendant, if the suit is either wholly or mainly due to his conduct in the matter.[3] So also a decree for specific performance of an ordinary agreement,[4] or of an agreement by way of compromise,[5] will be with costs, if the case set up by the defendant fails wholly on the merits, or the litigation has been due to his conduct in the matter.[6] If, on the other hand, the mistake is entirely owing to the conduct of the plaintiff, he must pay all the costs of the suit.[7] So also if the case set up by the plaintiff wholly fails on the merits, and the defendant has not been to blame in the matter, the bill will be dismissed with costs, whether the object of the suit be to rectify an instrument or to rescind a transaction.[8]

So also if a bill for the specific performance of an agreement

[1] Morley *v.* Rennoldson, 2 Ha. 584.

[2] Mortimer *v.* Shortall, 2 Dr. & War. 373; Alvanley *v.* Kinnaird, 2 Mac. & G. 9; Harris *v.* Pepperell, L. R. 5 Eq. 1; *supra*, p. 324.

[3] Bingham *v.* Bingham, 1 Ves. 126; East India Co. *v.* Donald, 9 Ves. 275; Dacre *v.* Gorges, 2 Sim. & St. 456; Sturge *v.* Sturge, 12 Beav. 245; Meadows *v.* Meadows, 16 Beav. 404; Coward *v.* Hughes, 1 K. & J. 451; Cox *v.* Bruton, 5 W. R. 544; Leuty *v.* Hillas, 2 D. & J. 122; Broughton *v.* Hutt, 3 D. & J. 501; Broun *v.* Kennedy, 33 Beav. 154; Harris *v.* Pepperell, L. R. 5 Eq. 1.

[4] Parker *v.* Taswell, 2 D. & J. 576.

[5] Attwood *v.* ———, 1 Russ. 353; 5 Russ. 150; Houghton *v.* Lees, 1 Jur. N. S. 862.

[6] Parker *v.* Taswell, 2 D. & J. 576.

[7] Harris *v.* Pepperell, L. R. 5 Eq. 1, *per* Lord Romilly.

[8] Naylor *v.* Winch, 1 Sim. & St. 555; Alexander *v.* Crosbie, Ll. & G. temp. Sug. 153; Okill *v.* Whittaker, 1 Deg. & Sm. 83; 2 Ph. 338; Westby *v.* Westby, 2 Dr. & War. 502; Howkins *v.* Jackson, 2 Mac. & G. 372; Meadows *v.* Meadows, 16 Beav. 405; Ridgway *v.* Sneyd, Kay, 637; Bentley *v.* Mackay, 31 Beav. 159; Bateman *v.* Boynton, L. R. 1 Ch. App. 368.

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* A bill to rectify an instrument must aver that it differs from the intention of the parties, and set forth the particulars. United States *v.* Munroe, 5 Mason, 572.

be dismissed, the dismissal will be with costs, if the case of mistake as set up by the plaintiff fails on the merits.[1] If there have been faults on both sides, costs will be given to neither, whether the object of the suit be to rectify or rescind a transaction.[2]

Although a bill for the rescission of a transaction, on the ground of mistake, be dismissed, the dismissal will be without costs, if the case of the plaintiff be a reasonable one on the merits; but his title to relief has failed through the absence of due diligence on his part in filing the bill;[3] or because the court could not interfere without prejudicing the rights of innocent parties.[4] So also although a bill for the rectification of an instrument be dismissed, the dismissal will be without costs, if the case as set up by the plaintiff be, on the whole, a reasonable one.[5] So also although a deed be cancelled, the circumstances of the case may be such that it will be without costs.[6] So also although a bill for the specific performance of an agreement be dismissed, the dismissal will be without costs, if the defendant has been to blame in the matter, either by mistaking the terms of the agreement, or by other acts of negligence; and the refusal of the court to interfere has proceeded merely on considerations as to the hardship to which the defendant would be exposed by being compelled to perform his agreement specifically.[7] So also where there has been a mutual misunderstanding,[8] or where the terms of

[1] Humphries *v.* Horne, 3 Ha. 276; Moxey *v.* Bigwood, 8 Jur. N. S. 803.

[2] Hitchcock *v.* Giddings, 4 Pri. 135; Mortimer *v.* Shortall, 2 Dr. & War. 373; Murray *v.* Parker, 19 Beav. 305; Alvanley *v.* Kinnaird, 2 Mac. & G. 9; Fowler *v.* Scottish Equitable Life Assurance Society, 28 L. J. Ch. 228; Garrard *v* Frankel, 30 Beav. 459; Price *v.* Ley, 11 W. R. 475; Harris *v.* Pepperell, L. R. 5 Eq. 1, *supra*, p. 324.

[3] Stone *v.* Godfrey, 18 Jur. 166; but see S. C. on appeal, 5 D. M. & G. 93.

[4] M'Alpine *v.* Swift, 1 Ba. & Be. 293.

[5] Cockerell *v.* Cholmeley, Taml. 445; 1 R. & M. 425; Ashhurst *v.* Mill, 7 Ha 515, 516; Barrow *v.* Barrow, 18 Beav 537; Lord Bradford *v.* Lord Romney 30 Beav. 441.

[6] Philippson *v.* Kerry, 32 Beav. 638

[7] Malins *v.* Freeman, 2 Keen, 32, Manser *v.* Buck, 6 Ha. 413; Wood *v.* Scarth, 2 K. & J. 33; Webster *v.* Cecil, 30 Beav. 64.

[8] Calverley *v.* Williams, 1 Ves. Jr. 210; Stratford *v.* Bosworth, 2 V. & B. 342. See Clowes *v.* Higginson, 1 V. & B. 524.

the contract are ambiguous, so that the one party may have reasonably put a different construction on the contract from what was contemplated by the other,[1] a bill for specific performance will be dismissed without costs. And so where parol evidence was admitted in opposition to specific performance.[2]

If parol evidence to vary the contract is introduced by the defendant, the bill should be strictly dismissed; and, therefore, if the court makes a decree at plaintiff's desire for specific performance of the contract according to defendant's evidence, the plaintiff must pay costs.[3] But inasmuch as parol evidence to vary the contract cannot be admitted on the part of the plaintiff to a bill for specific performance,[4] a bill for the specific performance of a contract with parol variation, though left out by fraud, was dismissed, but without costs.[5]

[1] Neap *v.* Abbott, 1 C. P. Coop. temp. Cott. 382; Baxendale *v.* Seale, 19 Beav. 613.

[2] Townshend *v.* Stangroom, 6 Ves. 328; Garrard *v.* Grinling, 2 Sw. 250.

[3] Fife *v.* Clayton, 13 Ves. 546; Mortimer *v.* Orchard, 2 Ves. Jr. 243.

[4] *Supra*, p. 348.

[5] Woollam *v.* Hearn, 7 Ves. 211; Lord Portman *v.* Morris, 2 Bro. C. C. 219; see Clowes *v.* Higginson, 1 V. & B. 524.

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